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In the Supreme Court of the United States

OCTOBER TERM 1975

No. 75-702

CONGRESS OF HISPANIC EDUCATORS, *et al.*,
Petitioners,

vs.

SCHOOL DISTRICT No. 1, DENVER, COLORADO, *et al.*,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit of the Congress of Hispanic Educators, et al.

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INDEX

	Page
Table of Authorities	v
Opinions Below	1
Jurisdiction	4
Questions Presented	4
Constitutional Provisions, Statutes and Regulations Involved	8
United States Constitutional Provisions	8
United States Statutes	8
Federal Regulations	8
State Statutes	9
Statement of the Case	10
Findings and Conclusions at the Original Trial	12
Court of Appeals' Review of the Original Trial	17
Supreme Court Review of the Original Trial	18
Retrial of the De Jure Segregation Issue on Remand	21
Petitioners' Intervention After the District Court's Finding of System-Wide De Jure Ethnic Segregation	22

Page

The Remedy Trial..... 25

The District Court's Decision on The Remedy..... 38

The Cross Appeals From the District Court's Actions on Remand..... 42

Court of Appeals Review of the District Court's Final Orders on Remand..... 44

Reasons for Granting the Writ..... 50

I. This Case Presents Important Questions Concerning Judicial Remedy of Unequal Educational Opportunities And National Origin Discrimination Suffered By Chicano School Children... 50

II. The Decision of the Court Of Appeals Limiting The Equitable Powers of the District Court To Eliminate De Jure Racial Discrimination "Root And Branch" Within Denver's Public Schools is Inconsistent With Prior Controlling Decisions of This Court And With Decisions of Other Circuit Courts..... 62

A. The Decision of the Court of Appeals Conflicts With Controlling Decisions of This Court Recognizing

Page

Vast Discretion in the Equitable Powers of the Trial Courts to Fashion Such Remedies as are Necessary to Eliminate "Root and Branch" System-Wide De Jure Racial Discrimination in a Single School System..... 62

B. The Decision of the Court of Appeals Conflicts With Decisions of Other Circuits, Especially With Those of the United States Court of Appeals for the Fifth Circuit, Mandating Detailed and Comprehensive Tri-Ethnic School Desegregation Plans, Including Plans Which Provide for Bilingual-Bicultural and Other Compensatory Programs..... 72

III. The Decision of the Court of Appeals is Inconsistent With This Court's Decisions and Conflicts With the Decisions of Other Circuit in That The Court of Appeals Failed to Give Appropriate Deference to Guidelines of The Department of Health, Education and Welfare for Implementing a Desegregation Remedy..... 83

Page

IV. This Case Raises Important Questions of Whether The Defendants' Systematic Failure to Respond to The Educational Needs of Chicano Public School Students Denied Them Equal Educational Opportunity Under the Fourteenth Amendment and Title VI of The Civil Rights Act of 1964, Which Have Not Been, But Ought to Be, Resolved By This Court..... 92

Conclusion..... 101

Appendix.....Joint Separate Appendix

TABLE OF AUTHORITIES

Cases:	Page
Arvizu v. Waco Independent School District, 373 F. Supp. 1264 (W.D. Tex. 1973), aff'd in part, rev'd as to other issues, 495 F.2d 499 (5th Cir. 1974).....	74,79
Brewer v. School Board of the City of Norfolk, Virginia 397 F.2d 37 (4th Cir. 1968)..	72
Brown v. Board of Education of Topeka, 347 U.S. 483 (1954).....	51,63
Brown v. Board of Education of Topeka, 349 U.S. 294 (1955)..	51,63 64,65
Davis v. Board of School Commissioners of Mobile County, 402 U.S. 33 (1971).....	68
Davis v. School District of Pontiac, Inc., 474 F.2d 46 (6th Cir. 1973), cert. denied, 413 U.S. 920 (1973).....	73
Green v. School Board of New Kent County, 391 U.S. 430 (1968).....	60,64 65,66 72,82,84
Griffin v. School Board of Prince Edward County, 377 U.S. 218 (1964).....	65

Page

Cases--Continued

Johnson v. San Francisco Unified School District, 339 F. Supp. 1315 (N.D. Ca.) petition for stay denied, sub nom, Guey Hueng v. Johnson, 404 U.S. 1215 (1971), remanded, 500 F.2d 349 (9th Cir. 1974)... 85

Katzenbach v. Morgan, 384 U.S. 641 (1966)..... 97,99

Keyes v. School District No. 1, 303 F. Supp. 279 (D. Colo. 1969), on remand, 303 F. Supp. 289 (D. Colo. 1969), 313 F. Supp. 61 (D. Colo. 1970), 313 F. Supp. 90 (D. Colo. 1970), aff'd in part, rev'd in part, remanded, 413 U.S. 189 (1973) on remand, 368 F. Supp. 207, (D. Colo. 1973), F.2d (10th Cir. Sept. 16, 1975) Appendix at pp. 2a-91a..... passim

Lau v. Nichols, 414 U.S. 563 (1974)..... 54,80,84,85,86,92,95,96,99

Louisiana v. United States, 380 U.S. 145 (1965)..... 65

McLaurin v. Oklahoma State Board of Regents, 339 U.S. 637 (1950)..... 100

Milliken v. Bradley, 418 U.S. 717 (1974)..... 68,69,70

Morales v. Shannon, 516 F.2d 411 (5th Cir. 1975)..... 74,80,90

Page

Cases--continued:

Morales v. Shannon, 366 F. Supp. 813 (W.D. Tex. 1973), rev'd in part, aff'd in part, and remanded with directions, 516 F.2d 411 (1975)..... 31,80

Morgan v. Hennigan, 379 F. Supp. 410 (1974) aff'd sub nom, Morgan v. Kerrigan, 509 F.2d 580 (1st Cir. 1975)..... 72

Morgan v. Kerrigan, ___ F. Supp. ___ (D. Mass. June 5, 1975) (Civ. Act. No. 72-911-6), on appeal (1st Cir. Nos. 75-1184, 75-1194, 75-1197, 75-1212) (argued Sept. 12, 1975)..... 79

Plessy v. Ferguson, 163 U.S. 537 (1896)..... 18

Serna v. Portales Municipal Schools, 499 F.2d 1147 (10th Cir. 1974)..... 54,81, 86,92

Singleton v. Jackson Municipal Separate School District, 348 F.2d 729 (5th Cir. 1965)..... 84,85

Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971), rehearing denied, 403 U.S. 912..... 66,67 68,84

Tasby v. Estes, 517 F.2d 92 (5th Cir. 1975)..... 74

Page

Cases--continued:

United States v. Jefferson County Board of Education, 380 F. 2d 385 (5th Cir. 1967) (en banc), cert. denied, 389 U.S. 840 (1967), reh. denied, 389 U.S. 965 (1967).....74,75,85

United States v. Jefferson County Board of Education, 372 F.2d 386 (5th Cir. 1966).. 85

United States v. Midland Independent School District, ___ F.2d ___ (5th Cir. Aug. 28, 1975) (No. 71-3271)..... 74

United States v. Montgomery County Board of Education, 395, U.S. 225 (1969).....64,65,66

United States v. Texas, 447 F.2d 441 (5th Cir. 1971), cert. denied, 404 U.S. 1016 (1972).. 76,85

United States v. Texas, 342 F. Supp. 24 (E.D. Tex. 1971), aff'd, 466 F.2d 518 (5th Cir. 1972)..... 30,77

United States v. Texas Education Agency (Austin Independent School District), 467 F.2d 848 (1972).....50,52,85

Page

Cases--continued

United States v. Texas (Austin Independent School District), Civ. No. A-70-CA-80 (W.D. Tex. August 1, 1973), pending on appeal, (5th Cir. No. 73-3301). 79

Williams v. Rhodes, 393 U.S. 23 (1969)..... 99

Wright v. Council of the City of Emporia, 407 U.S. 451 (1972)..... 65

Zamora v. New Braunfels Independent School District, __F.2d___ (5th Cir. Sept. 5, 1975) (No. 73-2999)..... 74

Constitution and Statutes Involved:

United States Constitution: Amendment XIV.....8,10,22,47,52,69,74,75,82,96,97,98,99,100

1975 Colorado Bilingual Bicultural Education Act....9,25,59,95,96

Statutes:

20 U.S.C. §§ 1701, et seq., Equal Educational Opportunities Act of 1974, 88 Stat. 514...6,8,23,58,81,87,98,99

28 U.S.C. § 1254(1)..... 4

28 U.S.C. § 1343(3)..... 10

Page

Statutes--continued:

42 U.S.C. § 1983..... 10,22

42 U.S.C. § 1985..... 10

42 U.S.C. § 1988..... 22

42 U.S.C. § 2000d et seq.....6,8,23,24,47, 48,56,75,82,83,86,92

Federal Regulations:

33 Fed. Reg. 4955 (March 23, 1968)..... 9

35 Fed. Reg. 11595, July 18, 1970. The May 25, 1970 Memorandum..... 9,87,93

45 C.F.R. Part 80--Nondiscrimination under programs receiving federal assistance through the Department of Health, Education, and Welfare Effectuation of Title VI of the Civil Rights Act of 1964 § 80.3(b).. 8

Department of Health, Education, and Welfare--Memorandum for Chief State School Officers--Subject: Evaluation of voluntary compliance plans designed to eliminate educational practices which deny non-English language dominant students equal educational opportunity..... 9

Page

Fed. regulations--continued:

Department of Health, Education and Welfare--Task Force Findings Specifying Remedies Available for Eliminating Past Educational Practices Ruled Unlawful Under Lau v. Nichols, Summer 1975.... 9,24,30 56,87,96

Miscellaneous:

U.S. Commission on Civil Rights, A Better Chance to Learn: Bilingual-Bicultural Education (Clearinghouse Publication No. 51, May 1975)..... 56

U.S. Commission on Civil Rights, Mexican American Education Study--Report I: Ethnic Isolation of Mexican Americans in the Public Schools of the Southwest (1971)..... 55

U.S. Commission on Civil Rights, Mexican American Education Study--Report II: The Unfinished Education (1971)..... 55

U.S. Commission on Civil Rights, Mexican American Education Study--Report III: Educational Practices Affecting Mexican Americans in the Southwest (1972)..... 55

Page

Miscellaneous--continued:

U.S. Commission on Civil Rights, Mexican American Education Study--Report IV: Mexican American Education in Texas: A Function of Wealth (1972)... 55

U.S. Commission on Civil Rights, Mexican American Education Study--Report V: Differences in Teacher Interaction With Mexican American and Anglo Students (1973)..... 55

U.S. Commission on Civil Rights, Mexican American Study--Report VI: Toward Quality Education for Mexican Americans (1974)..... 55,89

The petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered in this case on August 11, 1975, but stayed until September 16, 1975, when the Court of Appeals denied timely cross petitions for rehearing.

OPINIONS BELOW

The August 11, 1975 opinion of the United States Court of Appeals for the Tenth Circuit, affirming in part and revising or modifying in part, the final judgment of the United States District Court for the District of Colorado, is unreported. It is set forth in the Appendix at p. 2a[1/]. The Court of Appeals' September 16, 1975 Order denying timely cross petitions for rehearing is set forth in the Appendix at p. 1a. The opinions of the District Court, on

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1. A Joint Separate Appendix to this Petition and to the Separate Petition of the defendants, School District No. 1, et al., has been filed with this Court. References to the Joint Separate Appendix are given as Appendix at p. __.

remand from this Court, the first finding the respondents (defendants below) to have operated an illegal de jure tri-ethnic segregated school system, and the second imposing a comprehensive tri-ethnic desegregation plan, are reported at 368 F. Supp. 207 and 380 F. Supp. 673. They are also found in the Appendix at p. 270a and p. 122a respectively. The April 17, 1974, Final Judgment and Decree of the District Court is unreported. It is found in the Appendix at p. 92a.

Earlier decisions of the lower court, culminating in this Court's review and decision at 413 U.S. 189 (1973) are not included in the appendix. However, they are relevant to the questions submitted for review. The District Court's 1969 decisions granting a preliminary injunction against the defendants are reported at 303 F. Supp. 279 and 303 F. Supp. 289. The District Court's 1970 opinion and findings after a trial on the merits, that the defend-

ants had unlawfully denied equal educational opportunity to black and Chicano children in de facto segregated schools, is reported at 313 F. Supp. 61. The District Court's 1970 decision adopting a school desegregation and comprehensive education plan for Denver School District No. One is reported at 313 F. Supp. 90. The Court of Appeals' 1971 decision in part reversing the District Court on the ground that unconstitutional de jure segregation had not been proved, as to core city schools, is reported at 445 F.2d 990. The 1973 decision of this Court, reversing the decision of the Court of Appeals and ordering the case remanded to the District Court for a redetermination, according to legal standards announced by this Court in its opinion, of whether the defendants operated an unconsitutional de jure tri-ethnic segregated school system, is reported at 413 U.S. 189 (1973).[2/]

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2. Additional orders and opinions are described in a footnote to this Court's opinion. 413 U.S. at 194 n.5.

JURISDICTION

The judgment of the Court of Appeals was entered on August 11, 1975, in accordance with the Opinion issue on that date. That judgment was automatically stayed by the filing of timely cross petitions for rehearing which were denied by an Order of the Court of Appeals on September 16, 1975. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1)

QUESTIONS PRESENTED

1. Where the District Court correctly found Denver's public school authorities guilty of system-wide de jure segregation of their Chicano and black public school students, and further correctly found that Denver's public school authorities have otherwise discriminated against Denver's Chicano and black children by providing them with inferior programs, facilities and faculties, and generally with unequal educational opportunities which, especially as to the

Chicano public school students, results in large part from the Denver public school authorities' systematic failure to overcome language and cultural barriers, may the District Court require the Denver public school authorities to implement compensatory education programs, including bilingual-bicultural education programs, initially proposed and formulated by the Denver school authorities, within a court-ordered comprehensive desegregation plan which is designed to convert the unlawfully segregated tri-ethnic school system "to a unitary system in which racial discrimination would be eliminated root and branch"?

2. May the Court of Appeals, in reviewing the District Court's comprehensive public school desegregation plan, overrule the District Court's decision to require compensatory education, including bilingual-bicultural education, where the District Court's order is fully justified by the record and is fully consistent with the requirements, including substantial bilingual-bicultural programs, that

the Department of Health, Education and Welfare would impose on the public school authorities in desegregation compliance proceedings under Title VI of the Civil Rights Act of 1964?

3. Where the District Court's findings of fact, based upon the record made in numerous proceedings, compel the conclusion that the Denver public school system has failed to take appropriate action to overcome the language and cultural barriers that impede equal participation, particularly by its Chicano students in its instructional programs, should the District Court's order, which requires the Denver public school system to provide bilingual-bicultural education to its Chicano students, be sustained on the basis of the 1974 Equal Educational Opportunities Act, 20 U.S.C. § 1703(f) and Title VI of the Civil Rights Act of 1964, as interpreted in controlling regulations by the Department of Health, Education, and Welfare, both of which make it unlawful for a school district to

fail to take whatever steps are necessary to overcome such barriers?

4. Where the District Court, based upon findings and a record made in numerous proceedings, has concluded that Denver's public school authorities afford unequal educational opportunities to its minority group students under the Fourteenth Amendment, and that Chicano public school students suffer educational disabilities within the Denver public school system that are both similar to and different from those suffered by black public school students, may the District Court hold that this tri-ethnic discrimination violates the Fourteenth Amendment and tailor a compensatory education remedy that responds not only to the similarities but also to the differences in the harm suffered by the Chicano and black public school children of Denver?

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

These materials are so voluminous that they are included in the Separate Appendix to this Petition:

UNITED STATES CONSTITUTIONAL PROVISIONS

Fourteenth Amendment, Appendix at p. 283a.

UNITED STATES STATUTES

20 U.S.C. §§ 1701, 1703, 1706, 1708, 1712 (1974 Equal Educational Opportunities Act), Appendix at p. 284a.

42 U.S.C. § 2000d et seq. (Title VI of the Civil Rights Act of 1964), Appendix at p. 292a.

FEDERAL REGULATIONS

45 C.F.R. § 80.3(b)(1), Appendix at p. 301a.

FEDERAL REGULATIONS (cont.)

33 Fed. Reg. 4955, Appendix at p. 305a.

HEW May 25, 1970 Memorandum (35 Fed. Reg. 11595), Appendix at p. 319a.

HEW Summer 1975 Memorandum: "Evaluation of Voluntary Compliance Plans Designed to Eliminate Educational Practices Which Deny Non-English Language Dominant Students Equal Educational Opportunity." Appendix at p. 324a.

HEW - "Task Force Findings Specifying Remedies Available for Eliminating Past Educational Practices Ruled Unlawful Under Lau v. Nichols, Summer 1975." Appendix at p. 330a

STATE STATUTES:

The Colorado "Bilingual and Bicultural Education Act" of 1975, Appendix at p. 362a.

STATEMENT OF THE CASE

This is a tri-ethnic public school desegregation and equal educational opportunity lawsuit against the Denver, Colorado School District, the Board of Education and its Superintendent. The case concerns the remedy to be imposed when members of a linguistic and cultural minority group are found to be the victims of proven system-wide discrimination.

The original plaintiffs are children, including some Chicanos, attending Denver public schools, who sued through their parents. Initially, they sued under 42 U.S.C. §§ 1983, 1985, 28 U.S.C. § 1343(3), (4), and the Fourteenth Amendment of the United States Constitution to enjoin the defendants from segregating minority children and faculty on the basis of race, and further from unequally allocating resources, services, facilities and plant on the basis of race.

The petitioners in this Court are the Congress of Hispanic Educators (CHE), Chicano public school students and Chicano parents of children attending Denver public schools, representing classes of Chicano teachers, students and parents. They successfully intervened as plaintiffs in the lawsuit after the District Court, on remand from this Court, found that system-wide the defendants are operating an unconsitutionally segregated and discriminatory tri-ethnic school system.[3/] They intervened to assure that the remedy plan to be adopted by the Court adequately rectified the harm caused to Chicanos by the defendants' unlawful acts; for the harm suffered by the Chicanos is similar but not identical to the harm suffered by blacks.

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3. The District Court judge in the original proceedings in this case, William E. Doyle, has continued to preside over the case, after remand, even though he has since been elevated to the United States Court of Appeals for the Tenth Circuit.

In this statement of the case, petitioners will recite only the facts and proceedings directly bearing upon the substantive questions for which they seek a writ of certiorari. The opinion of this Court, when the case was last before it, outlines more generally the fact findings and numerous proceedings to that date. 413 U.S. at 191-95.

Findings and Conclusions at the Original Trial

The original trial on the merits of this case was conducted in February 1970. See 313 F. Supp. 61. The District Court's finding that the defendants had unlawfully segregated the schools in Denver's Park Hill section was sustained by this Court as well as by the Court of Appeals. See 445 F.2d 990; 413 U.S. 189. Issue was joined in the appellate courts only over the District Court's characterization and treatment of the tri-ethnic segregation that the District Court found to pervade the public schools in other geographic areas of Denver, especially in

the core city areas. As this Court noted, in these earlier proceedings the District Court incorrectly held that the plaintiffs "had to make a fresh showing of de jure segregation in each area of the city for which they sought relief." 413 U.S. at 193. Employing this incorrect legal standard, the District Court found that, except in the Park Hill area, the defendants operate a de facto rather than a de jure segregated school system.

The District Court concluded that, by itself, de facto segregation would give rise to no constitutional violation. However, as this Court observed, the District Court found that the racially segregated core city schools, with predominantly minority group pupil populations,

> were educationally inferior to the predominantly "white" or "Anglo" schools in other parts of the district--that is, "separate facilities. . . unequal in the quality of education provided."

413 U.S. at 193, quoting 313 F. Supp. at 83. On the basis of this finding, the District Court held that the defendants

> . . . constitutionally "must at a minimum . . . offer an equal educational opportunity," 313 F. Supp., at 83, and, therefore, although all-out desegregation "could not be decreed, . . . the only feasible and constitutionally acceptable -- the only program which furnishes anything approaching substantial equality -- is a system of desegregation and integration which provides compensatory education in an integrated environment." 313 F. Supp. 90,96 (1970).

413 U.S. at 193-94. As this Court noted, "The District Court then formulated a varied remedial plan to that end which was incorporated in the Final Decree." 413 U.S. at 194.

At the original trial to determine whether the defendants had violated the plaintiffs' rights, the District Court received and evaluated considerable evidence concerning the relative quality of the educational resources and results

available at the plaintiffs' target schools, which were twenty-seven predominantly minority core city and Park Hill schools. On this evidence, the District Court found a clear "relationship between racial concentration and inferiority in achievement and low standards and consequently low morale." 313 F. Supp. at 77. Focusing more specifically on schools with "a concentration of either Negro or Hispano students in the general area of 70 to 75 percent", 313 F. Supp. at 77, the Court found that each of these fifteen schools was characterized by disproportionately "(1) low average scholastic achievement; (2) less experienced teachers; (3) higher rates of teacher turnover; (4) higher dropout rates; and (5) older buildings and smaller sites." 313 F. Supp. at 77. (For the District Court's specific findings on each of these factors, see 313 F. Supp. at 78-82. Accord: 445 F.2d at 1003.)

Indeed, after further proceedings to fashion the remedy, the District Court recited that it

> . . . found, in accordance with the overwhelming weight of the evidence, that the racial isolation of Negro and Hispano children which exists in the fifteen schools designated in this Court's opinion of March 21, 1970, together with Elyria and Smedley Elementary Schools, is the primary factor producing inequality of educational opportunity at those schools and that this inequality can be remedied only through a combined program of desegregation, together with a massive program of compensatory education. . . .

313 F. Supp. at 97. Based on the extensive record, the District Court also concluded that the only workable remedy for the defendants' constitutional violations had to mandate pupil assignment and compensatory education programs in a single interrelated and comprehensive plan, for:

> Desegregation in and of itself cannot achieve the objective of improving the quality of the education in schools. It must be

> carried out in an atmosphere of comprehensive education and preparation of teachers, pupils, parents and the community. It also must be coupled with an intense and massive compensatory education program for the students if it is to be successful.

313 F. Supp. at 97.

In its plan to provide equal educational opportunities, the District Court desegregated the Park Hill and core city schools. For non-pupil placement components of the plan, the Court relied heavily on the defendants' own proposals, which included compensatory education and bilingual-bicultural education components. 313 F. Supp. at 99.

Court of Appeals' Review of the Original Trial

The Court of Appeals affirmed the District Court's Final Judgment and Decree

> . . . in all respects except that part pertaining to the core area or court designated schools, and

> particularly the legal determination by the court that such schools were maintained in violation of the Fourteenth Amendment because of the unequal educational opportunity afforded. . . .

445 F.2d at 1007.

The Court of Appeals neither overturned nor contested the District Court's findings that educational opportunity in the court-designated schools was in fact unequal relative to the educational opportunity in Anglo schools in other parts of the district. See 445 F.2d at 1003-04. The Court of Appeals, however, rejected the District Court's legal conclusion that this Court's decision in Plessy v. Ferguson, 163 U.S. 537 (1896), renders unconstitutional proven unequal educational opportunity afforded in a racially segregated school, regardless of whether the segregation is de facto or de jure. 445 F.2d at 1004-05.

Supreme Court Review of the Original Trial

This Court, in reviewing these

earlier proceedings (413 U.S. 189), decided two points of law pertinent to the questions presented by this petition. First, the Court ruled "that the District Court erred in separating Negroes and Hispanos for purposes of defining a 'segregated' school." 413 U.S. at 197. Thus, ". . . schools with a combined predominance of Negroes and Hispanos [should be] included in the category of 'segregated' schools." 413 U.S. at 198.

Second, the Court concluded that neither the Court of Appeals nor the District Court applied the correct legal standard in determining whether the defendants had "engaged in an unconstitutional policy of deliberate segregation in the core city schools." 413 U.S. at 198. This Court, in parts II and III of its opinion, formulated the controlling standards for proving unconstitutional de jure segregation. 413 U.S. at 198-214. Under the standard set forth in part III, the District Court's earlier finding, sustained by the appellate courts, of

intentionally segregative School Board action in a meaningful portion of the Denver school system created "a prima facie case of unlawful segregative design on the part of school authorities, and shifts to these authorities the burden of proving that other segregated schools within the system are not also the result of intentionally segregative action." 413 U.S. at 208.

To enable the District Court, on remand, to reconsider the contested issues according to the correct legal standards, this Court modified the judgment of the Court of Appeals "to vacate instead of reverse the parts of the Final Decree that concern the core city schools. . . ." 413 U.S. at 214.

Significantly, this Court expressly reserved its decision on the question of whether the District Court could order desegregation and compensatory education in the absence of a finding of de jure segregation. 413 U.S. at 214 n. 18.

Retrial of the De Jure Segregation Issue on Remand

On remand, the District Court conducted an additional evidentiary trial to determine whether the defendants were guilty of unconstitutional system-wide segregation. After a full hearing, augmenting and not displacing the earlier record in the case, the District Court concluded, in a Memorandum Opinion and Order dated December 11, 1973, that the Denver system is a tri-ethnic school system which is unlawfully segregated. 368 F. Supp. 207, Appendix at p. 270a.[4/]

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4. Thus the trial court determined, under part II of this Court's opinion, 413 U.S. at 198-205, that the Park Hill area and schools were not separate, independent or unrelated to the rest of the school district. The District Court, after considering the School District's evidence that its "Park Hill" actions had no effect elsewhere, rejected the evidence as "conclusory and . . . lacking in substance," and held that "Plaintiff's evidence established that racial segregation in Park Hill has substantial

Petitioners' Intervention After the District Court's Finding of System-Wide De Jure Tri-Ethnic Segregation

On January 11, 1974, the District Court granted a Motion to Intervene as Parties Plaintiffs, which had been filed on January 4, 1974, by the Congress of Hispanic Educators (CHE) and a group of Chicano parents and children suing on behalf of classes including Chicano teachers, parents and students who would be affected by the desegregation of the school district.

The Complaint in Intervention alleged deprivation of rights secured by the "Fourteenth Amendment to the Constitution and 42 U.S.C. §§ 1983, 1988,

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(footnote cont.)
effects on the schools outside the area." 368 F. Supp. at 210. The District Court stated: "The conclusion is therefore inescapable that the Denver system is a dual system within the Supreme Court's definitions." Ibid.

2000c-8 and 2000d"[5/] (Comp. ¶1.), including discrimination by the defendants in the hiring, promotion, recruitment, assignment and selection of Hispano teachers, staff members and administrators (Id. at ¶¶23, 25, and 26). Additionally, the Intervenors incorporated the allegations of unequal educational opportunity set forth in the plaintiffs' Complaint. They also specifically alleged that Chicanos constitute a separate identifiable class within the Denver school system. (Id. at ¶13.)

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5. During the pendency of this appeal, Congress enacted 88 Stat. 514, 20 U.S.C. §§ 1701 et seq. (Supp.), the 1974 Equal Educational Opportunities Act. See Appendix at pp. 284a - 91a. These provisions were brought to the attention of the Court of Appeals.

As the court's decision was being rendered, the United States Department of Health, Education, and Welfare issued new regulations implementing Title VI of the Civil Rights Act of 1964 as it bears upon educational discrimination against minorities suffering from English language

The Intervenors' prayer for relief sought, inter alia, to restrain defendants from

> (a) utilizing teaching methods, curricula, and other policies that discriminate against intervenors and their class;
>
> (b) operating the defendant district in a fashion which violates Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, and HEW Guidelines promulgated pursuant to 42 U.S.C. § 2000d-1;

(footnote cont.)
disabilities. These regulations, which are about to be published in the Federal Register, and have been transmitted to each state's Chief State School Officer (Appendix 324a-29a), are entitled: "Task Force Findings Specifying Remedies Available for Eliminating Past Educational Practices Ruled Unlawful Under Lau v. Nichols." These regulations are reproduced in the Appendix at pp. 330a-61a.

During the pendency of the appeal, the Colorado Legislature also took action relevant to the issues in this case. They enacted a comprehensive law, apparently consistent with the new

* * *

(e) denying equal educational opportunity in any other manner to Chicano students on the basis of language, culture, race, color or ethnic origin;

Id. at ¶29 (a), (b), (e).

The Remedy Trial

The District Court conducted a remedy trial from February 19, 1974, to March 4, 1974. At this trial the parties' proposed plans were introduced and evaluated, and additional evidence was received by the Court. The Intervenors participated in the remedy trial, and filed their plan, which included the Cardenas Plan, as well as more detailed specifics provided by CHE in consultation with Dr. Jose Cardenas, the plan's drafter, from its more intimate knowledge

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(footnote cont.)
HEW regulations, entitled the "Bilingual and Bicultural Education Act" of 1975. This statute is reproduced in the Appendix at pp. 362a - 416a.

of particular problems within the Denver school system.

As directed by the District Court, the defendants filed a plan, entitled, tellingly enough: "A Plan for Expanding Educational Opportunity in the Denver Public Schools." (Defendants' X-YA.) This plan was not a comprehensive desegregation plan, for it did not provide for much pupil assignment; it was more of a comprehensive equal educational opportunity plan, featuring extensive compensatory education components designed to redress the proven unequal educational opportunities received by minority students. Notably, the portion of the plan proposing "Integration of the Student Body Through New Programs", included a "Multi-Cultural Education Program" designed "to develop in students greater self-esteem, pride in cultural heritage, and positive feelings and respect for other cultures . . ." (Defendants' X-YA, § III, pp. 18, 19.)

One section of the plan was devoted exclusively to "Integration Through Curriculum, Programs, Activities, and Related Improvements." The proposals included one entitled:

Bilingual-Bicultural Education

> Through these programs, school personnel address the needs of bilingual-bicultural students to help them understand and appreciate different racial and cultural heritages. Programs are geared to help minority students find their cultural identity. The objectives of these programs are to:
>
> > provide language stimulation and experience designed to facilitate maximum growth in the use of the English language;
> >
> > foster a feeling of adequacy in each student, to help him cope with an English-speaking society;
> >
> > help each student develop self-direction, the ability to make appropriate practical decisions, and the ability to communicate effectively with others;

> maintain a pride in one's native language and culture, and share one's cultural heritage with others.
>
> Skills and competencies of teachers working with bilingual-bicultural students are developed through in-service programs.
>
> Minority History and Culture
>
> Additional new programs in minority history and culture are planned for students whose cultural heritage is different from the school culture. The objective of these programs is to bridge cultural barriers and meet language needs to make regular school offerings more productive for each student.

(Defendants' X-YA, § IV, p. 20) (Emphasis in original).

The Intervenors and the original plaintiffs cooperated in the formulation and presentation of their plans. The plaintiffs concentrated on preparation of the pupil placement components of the comprehensive desegregation plan. (E.g., Plaintiffs' X-900, 900(a) - 900(i).)

The Intervenors prepared the other equal educational opportunities components of the comprehensive desegregation plan, stressing multi-cultural, bilingual and other compensatory education approaches. (MALDEF X-1.)

The Intervenors' plan was developed by Dr. Jose Cardenas, an experienced educator familiar with the problems of Chicano and other minority children attempting to cope with an educational system directed toward middle class Anglo children. (MALDEF X-1; Tr. 979-81.)[6/]

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6. Dr. Cardenas has developed his analysis of programs to provide equal educational opportunities for minority group children in part through his past work with HEW's Office of Education. He has been used extensively in several school districts as an educational consultant for HEW in its compliance reviews. For HEW's use he has developed plans quite similar to the plan adopted by the District Court. Such plans have been successfully implemented in numerous school districts,

Dr. Cardenas found that through its system-wide tri-ethnic discrimination, the Denver school system consistently denied equal educational opportunities to minority group children. He specifically testified that these deprivations were amply reflected in statistics that show, relative to white or Anglo students: (a) a higher number and percentage of

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(footnote cont.)
including, for example, the Beeville Independent School District, Texas and the El Paso Independent School District, Texas (Tr. 1063). He was also a member of the HEW Task Force that formulated HEW's recent regulations under Title VI, entitled: "Task Force Findings Specifying Remedies Available for Eliminating Past Educational Practices Ruled Unlawful Under Lau v. Nichols." Appendix at pp. 330a - 61a.

Federal district judges, in addition to Judge Doyle, have used his expertise in fashioning comprehensive desegregation plans. For example, in United States v. Texas, 342 F. Supp. 24, 28 (E.D. Tex. 1971), aff'd, 466 F.2d 518 (5th Cir. 1972), the District Court relied extensively on Dr. Cardenas in formulating a compre-

Denver's minority children assigned to special education, (b) a higher level of retention rates (failure to pass) for minority children, (c) higher drop-out rates for minority children, and (d) higher rates of under-achieving by minority children, especially in predominantly minority schools. (Tr. 984-87; 1141-43; MALDEF X-9.) Dr. Cardenas was also familiar with the District Court's prior fact findings as to the inferiority of the minority schools, viewed from the

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(footnote cont.)
hensive plan very similar to the one adopted by Judge Doyle in the instant case. Additionally, Dr. Cardenas testified as an expert in both HEW compliance proceedings and court proceedings concerning denial, by the Uvalde (Texas) Independent School District, of equal educational opportunity to Chicano students. (Tr. 1024.) See, Morales v. Shannon, 366 F. Supp. 813 (W.D. Tex. 1973), rev'd in part, aff'd in part, 516 F.2d 411 (5th Cir. 1975); Matter of Board of Education of Uvalde Independent School District, Administrative proceedings, Department of Health, Education and Welfare (Docket No. S-47, July 24, 1974). (Final Decision of Reviewing Authority.)

perspective of objective data showing, by comparison with Anglo schools, substantially lower levels of academic achievement, inexperienced faculty, higher faculty turnover, and lower academic standards. (313 F. Supp. 61 (D. Colo. 1970).) He relied upon these findings as further evidence of the defendants' systematic denial of equal educational opportunity to minority group children.

The school district had discovered several hundred Hispano children who were unable to speak or understand English, i.e., they were monolingual in Spanish; and the school district had established special programs for these children. These programs were directed toward teaching English as a second language; and as soon as this was accomplished, Spanish was dropped and the child was put into regular classes. (Defendants' X-YA, App. F; Tr. 565-73.)

Dr. Cardenas found such programs deficient for several reasons. They did not reach the many Chicano children,

estimated by CHE to number some 4,000 (MALDEF X-2), who, although perhaps able to speak English, could understand Spanish better than English. There were no bilingual programs for such children. Secondly, Chicano children enrolled in the special "English as a second language" program received no instruction in academic subjects other than in English; thus, their learning of arithmetic, social studies, science, and other academic subjects was precluded until they learned English. (Tr. 1007.) By that time the children were behind in these subjects. By contrast, Dr. Cardenas proposed a bilingual program in which the monolingual Spanish and Spanish-dominant child was also taught these other academic subjects in Spanish. (Tr. 1001-10.)

Thirdly, even for Chicano children who could speak and understand English as well as, or even better than, Spanish, as the statistical and other evidence demonstrated, the school system directly impaired their ability to secure an education on an equal basis with Anglos.

(Tr. 1006.) Dr. Cardenas maintained that the Denver school system's refusal to recognize the Chicano child's heritage and culture by offering the option of bilingual-bicultural programs to such children was extremely harmful to them. This failure of the school system denigrated the Chicano child's culture and treated it as less worthy, resulting in a lower self-image for the child which severely limited his or her educational opportunities.

Dr. Cardenas' conclusions resulted from a thorough study of the various ways in which the Denver school system's educational approach to the minority child was incompatible with minority children, and therefore denied them equal educational opportunities. Thus the system failed to recognize five attributes of minority children: culture, language, poverty, mobility and perceptions. (Tr. 991-1019.) Dr. Cardenas also discerned ten different general types of activities wherein the system failed to take these attributes into account: educational

philosophy, policies, the scope and sequence of courses, curriculum, staffing, co-curricular activities, student personnel services, non-instructional needs, community involvement and evaluation. (Tr. 1020-23.)

Dr. Cardenas stressed that it is most important to appreciate the fact that all of the racially discriminatory deficiencies of the Denver school system are interdependent and interrelated. Elimination of racial discrimination within that school system requires a comprehensive, overall approach to the tri-ethnic problems. They cannot be treated separately, if the goal of legal treatment is establishment of a unitary school system in which equal educational opportunity is available to all races and groups. (Tr. 1015; 1022.)[7/] Notably,

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7. The Addendum to the Cardenas Plan was developed by the members of CHE as a suggested application of Dr. Cardenas' principles to the particular needs in the Denver public schools. (MALDEF X-2; Tr. 1030-41.) The Addendum contains over

Dr. Cardenas also testified that such a comprehensive remedy could and should be implemented in a fully integrated setting. (Tr. 1135-39.)

Dr. Cardenas' evaluation of the needs and deficiencies resulting from the Denver school system's racial discrimination, as well as his proposals for a workable solution, were largely uncontested by the defendant's evidence. As noted by the District Court,

> Most of the opposition to the Cardenas plan generated during the evidentiary hearings went to the practicality of the plan and to problems of its implementation rather than to the educational principles espoused.

380 F. Supp. at 696, Appendix at p. 206a.

(footnote cont.)

200 detailed suggestions regarding implementation, in all of the ten general areas of activity identified by Dr. Cardenas.

The Cardenas Plan was extensively discussed by witnesses for the defendants as well as those testifying on behalf of the Congress of Hispanic Educators. Each witness supported in principle the objectives of the Cardenas Plan and the Addendum. For example, although the Superintendent of Schools, Dr. Louis Kishkunas, did express some reservations, he testified that:

> I found as I read the plan that most of the conclusions that Dr. Cardenas came to replicated or duplicated the conclusions that I came to a long time ago. . . I am sure that many of the conclusions he came to, many of the facts that he states are applicable to the Denver situation.

(Tr. 197.) Dr. David Roscoe Davidson, Assistant Superintendant of the Educational Division, also supported the Cardenas Plan and the Addendum in his testimony. (Tr. 2273-74.)

The testimony in support of the Cardenas Plan demonstrated without contradiction that similar compensatory educa-

tion and bilingual-bicultural programs have operated with marked success in redressing unequal educational opportunities, especially in a desegregation context, in other varied school districts throughout the country. (Tr. 1023-29; 1035-36; 1060-64; 1077-78; 1163-1217.) Moreover, the bilingual-bicultural components of the Cardenas Plan were, for the most part, consistent with a program already operated by the defendants at the Del Pueblo Elementary School. (Tr. 1150-62.)

The District Court's Decision on The Remedy

After the remedy trial, the District Court prepared an extensive Memorandum Opinion and Order evaluating the various plans before it and articulating the plan it adopted. 380 F. Supp. 673-726, Appendix at pp. 122a-269a (April 8, 1974). The court clearly stated that the plan it intended to fashion was designed to remedy the violations it had found on all of the evidence in the case and at each

proceeding:

> The educational opportunity in the minority schools has been proven in our present trial as well as in previous trials to be inferior to that in the majority schools.

380 F. Supp. at 682, Appendix at p. 156a.

Finding the original parties' plans to be inadequate, 380 F. Supp. at 682-83, Appendix at pp. 155a-58a, the court formulated its own comprehensive plan. For the pupil placement elements, it relied on proposals prepared by Dr. John A. Finger, a court appointed expert, 380 F. Supp. at 688-94, Appendix at pp. 178a-98a, and for bilingual-bicultural and other compensatory education components, it relied on the Intervenors' plan, 380 F. Supp. at 680-81, 692, 694-96, 697; Appendix at pp. 153a-55a, 189a-91a, 199a-207a, 210a.

In adopting the Cardenas Plan, the District Court observed that it was

> . . . mindful that meaningful desegregation must be accompanied by some appropriate alterations of existing educational programs in order to adequately deal with new problems which will arise in the operation of desegregated rather than segregated schools.
>
> The type of educational program proposed by Dr. Cardenas is particularly appropriate for the Denver school system because of the city's and region's long tradition of Mexican and Chicano influences. Additionally, Colorado law specifically encourages the use of bilingual and multicultural programs such as those proposed by the Cardenas plan to effect an enriching and nondisruptive transition of minority children from their dominant language to the effective use of English.

380 F. Supp. at 695-96; Appendix at pp. 203a-05a.

Finding that the Del Pueblo Elementary School was already operating a bilingual-bicultural program on a model or pilot basis that was very consistent with the Cardenas Plan, 380 F. Supp. at 692, 696, Appendix, at pp. 190a, 206a-07a,

the court adopted that program as a model (380 F. Supp. at 692, Appendix at p. 190a) and directed "that a prompt start should be made in a pilot program for implementation and utilization of the Cardenas plan, or something similar to it, in Denver" 380 F. Supp. at 696, Appendix at p. 206a. The court proposed to maintain the existing program at Del Pueblo, and to extend it on a pilot basis to one senior high school, one junior high school and two additional elementary schools. (380 F. Supp. at 692, 696, Appendix at pp. 190a, 206a.)[8/] In further stating the reasons for adopting this approach, it found:

> . . . that most of our Spanish surnamed or Mexican-American children are able to speak English and thus teaching in the Spanish language would not be necessary. Nevertheless, the Spanish language is a more natural one for a great many Spanish surnamed or

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8. Under the District Court's Final Judgment and Decree, the program was initially ordered extended to a third elementary school as well. Appendix at p. 107a.

> Mexican-American students. Thus extensive curriculum offerings in the Spanish language and in Spanish culture would be appropriate in the mentioned schools.

380 F. Supp. at 692, Appendix at p. 191a.

The District Court's Final Judgment and Decree, Appendix at pp. 92a-122a, ordered, inter alia, that:

> The defendants shall further develop a bilingual-bicultural educational program in accordance with the model presented by Dr. Jose Cardenas or a plan substantially and materially similar thereto and incorporating to the extent feasible the proposals set forth in the Addendum to the Cardenas Plan.

Appendix at p. 106a (emphasis added).

The Cross Appeals From the District Court's Actions on Remand

Cross appeals were taken from various components of the Final Judgment and Decree by the plaintiffs and the defendants. Basically, the plaintiffs con-

tended that the District Court's plan provided for insufficient integration in that it substituted, to an undue extent, part time integration for full time integration, and needlessly left five minority schools segregated; it needlessly placed a disproportionate burden of changed school assignments on minority children; and it was less effective than the plaintiffs' plans. The defendants challenged the District Court's findings that they were guilty of system-wide de jure segregation. They also challenged the court's plan basically on the grounds that the court unlawfully directed that specific degrees of racial balance be attained; that imposition of the Cardenas bilingual-bicultural plan was an unwarranted intrusion into matters of educational policy and curriculum; and that the court unlawfully ordered the defendants to adopt an affirmative action employment plan. Both the original plaintiffs and the Intervenors, CHE, opposed the defendants' assault on the District Court's plan as appellees.

Court of Appeals Review of the District Court's Final Orders on Remand

The Court of Appeals affirmed in part and reversed in part, and remanded the case for further proceedings. (Appendix at p. 2a.) The Court of Appeals affirmed the District Court's findings and conclusion that the defendants operated a system-wide de jure tri-ethnic segregated school system. (Appendix at pp. 18a-19a.) The Court of Appeals also sustained the District Court's use of Anglo-minority enrollment percentages as guidelines in shaping its remedy (Appendix at pp. 32a-33a), and its general reliance on Dr. Finger's pupil reassignment proposals (Appendix at pp. 43a to 45a). The Court of Appeals further ruled that the District Court's pupil reassignment plan did not impermissibly burden minority students (Appendix at pp. 44a-45a) and upheld its faculty and staff desegregation plan (Appendix at pp. 62a-65a).

The District Court was reversed in three areas. First the Court of Appeals held the part-time elementary school pairing components of the District Court's plan were constitutionally inadequate. (Appendix at pp. 37a-43a.) Second, the Court of Appeals ruled that the District Court improperly left five predominantly Chicano schools segregated under its guidelines. (Appendix at pp. 45a-48a.)[9/] Third, the Court of Appeals reversed the District Court's imposition of the

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9. The Court of Appeals concluded that "The [district] court justified the continued segregation of students in four of these schools--on grounds of the schools' inaccessibility and the institution or confirmation of bilingual-bicultural programs." (Appendix at p. 46a.) The Court of Appeals ruled that "bilingual education . . . is not a substitute for desegregation. Although bilingual instruction may be required to prevent the isolation of minority students in a predominantly Anglo school system [citations omitted], such instruction must be subordinate to a plan of school desegregation." (Appendix at p. 47a.) That portion of the case was remanded

Cardenas Plan. (Appendix 48a-60a.)[10/]

The Court of Appeals ruled that imposition of the Cardenas Plan could not be justified on the grounds (1) that it "is necessary to effectuate meaningful [de]segregation in the [defendants'] schools" (Appendix at p. 51a); (2) that it corrects the defendants' proven fail-

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(footnote cont.)
for a determination of whether the continued segregation of students at the contested schools could be justified on acceptable grounds.

The Intervenors have never taken the position that bilingual-bicultural education is a substitute for desegregation. Much to the contrary, they have always taken the position that the Cardenas Plan can and should be implemented within a fully integrated setting. (See, e.g., Tr. 1135-39.) Indeed, it has always been the Intervenors' position that both pupil placement and compensatory education components are necessary to achieve constitutionally sufficient conversion of a de jure segregated school system into a lawful unitary system.

10. On grounds similar to its rejection of the

ure to provide an equal educational opportunity, which "constitutes a separate violation of the Fourteenth Amendment . . ." (Appendix at p. 52a); or (3) that it corrects the defendants' separate violation of Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000d, and the regulations promulgated pursuant to it, "in failing to provide language instruction to substantial numbers of non-English speaking children enrolled in public schools" (Appendix at p. 58a).

Apparently limiting the factual predicates for the District Court's Final Decree to the record and findings subsequent to this Court's remand, and therefore precluding reliance on the earlier evidence and findings, the Court of Appeals held that the District Court's remedy "goes too far" (Appendix at p. 54a), in that it went beyond "the proven con-

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(footnote cont.)
Cardenas Plan, the Court of Appeals also reversed the District Court's order consolidating East and Manual High Schools. (Appendix at pp. 60a-62a.)

stitutional violation" of de jure segregation (Appendix at p. 53a), and unduly invaded local control which "permits citizen participation in the formulation of school policy and encourages innovation to meet particular local needs" (Appendix at p. 55a). Further, the Court of Appeals ruled plaintiffs and Intervenors had proved no denial of equal educational opportunity, amounting to a somewhat independent violation of the Fourteenth Amendment. (Appendix at p. 56a.) Finally, the Court of Appeals concluded that there is no "support [in the record] for a violation of section 601" of the Civil Rights Act of 1964 because in the 1973-74 school year, "school authorities identified 344 students in the system with language difficulties arising from their Spanish-speaking backgrounds", "determined that 251 of these students needed special help in acquiring language skills necessary to function satisfactorily in school," and operated "a number of programs . . . directed to the needs

of these students." (Appendix at p. 58a n. 22.)[11]/

Despite, and somewhat in contradiction to these conclusions, the Court of Appeals remanded "for a determination of the relief, if any, necessary to insure that Hispano and other minority children will have the opportunity to acquire proficiency in the English language." (Appendix at p. 59a.) In a separate concurring opinion, Judge Seth indicated that he would have remanded "for a complete reconsideration of the remedy." (Appendix at p. 83a.)

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11. The Court of Appeals completely ignored Intervenors' evidence, in the Record, that these programs do not reach the many Chicano children, estimated by CHE to number some 4,000 (MALDEF X-2), who could understand Spanish better than English, even though they might be able to speak English. Nor did the Court of Appeals consider the Intervenors' evidence that the existing programs were otherwise deficient. (E.g. Tr. 1001-10.)

REASONS FOR GRANTING THE WRIT

I. THIS CASE PRESENTS IMPORTANT QUESTIONS CONCERNING JUDICIAL REMEDY OF UNEQUAL EDUCATIONAL OPPORTUNITIES AND NATIONAL ORIGIN DISCRIMINATION SUFFERED BY CHICANO SCHOOL CHILDREN.

This lawsuit comes before the Court freighted with a significant history. In its previous opinion in this case, the Court relied upon findings of the United States Commission on Civil Rights and the District Court to conclude that Chicanos in the Southwest "suffer from the same educational inequities as Negroes and American Indians." 413 U.S. at 197. See, e.g., United States v. Texas Education Agency (Austin Independent School District), 467 F.2d 848, 852 (5th Cir. 1972). Furthermore, in that opinion the Court established the preliminary rules for determining when educational inequalities are unconstitutional with respect to Chicano students. Thus,

in its constitutional impact and its precedential significance, the Keyes decision was as important for Chicano students as this Court's decision in Brown v. Board of Education of Topeka, 347 U.S. 483 (1954) (Brown I) was for black students. For Chicano people, and many other linguistic and national origin minority groups, the instant proceedings are analogous to Brown II [12], in that this Petition places before the Court important questions concerning the remedy to be imposed once a trial court finds that a school system unconstitutionally segregates and discriminates against Chicanos. This case presents the question of whether, in fashioning remedies for proven constitutional violations of the rights of Chicanos and other language minorities, school authorities and trial courts should take account of the differences, as well as the simi-

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12. Brown v. Board of Education of Topeka, 349 U.S. 294 (1955).

larities in the educational inequalities that Chicanos, as opposed to blacks, suffer.

As the Fifth Circuit recently recognized, Chicanos constitute a constitutionally identifiable and separate national origin minority, and "[t]hey are as much entitled to the benefits of the Equal Protection Clause of the Fourteenth Amendment as blacks or whites." Hence, courts should "give effect to the legal consequences of the . . . recognition of Mexican-Americans as a separate minority group." United States v. Texas Education Agency (Austin Independent School District), 467 F.2d 848, 852 (5th Cir. 1972).

The case for differential treatment is compelling in the instant lawsuit. For, as the District Court found, Chicanos and not blacks constitute the largest constitutionally identifiable minority in the Denver school system.

> The scope and magnitude of the problem is evidenced by the numbers and ethnic origins of students as of September 28, 1973. In the elementary schools there were 46,060 students, including 17.6% black, 27% Spanish-surnamed and 54.1% Anglo. The total enrollment in the junior high schools on the same date was 21,018, including 18.5% black, 24% Spanish-surnamed, and 56.6% white. The senior high schools totaled 20,542. The percentage of black students was 17.3%, that of Spanish-surnamed students was 17.8% and that of Anglo students was 63.8%.

380 F. Supp. at 674. If anything, the deprivations suffered by Chicanos within the Denver school system are even greater than those suffered by blacks.

This Court has begun to recognize the differences in the unequal educational opportunities suffered by language and national origin minorities as opposed to blacks. The Court has held, albeit in a statutory rather than a

constitutional context, that "there is no equality of treatment [of members of language minority groups] merely by providing students with the same facilities, textbooks, teachers, and curriculum; for students who do not understand English are effectively foreclosed from any meaningful education." Lau v. Nichols, 414 U.S. 563, 566 (1974). Accord: Serna v. Portales Municipal Schools, 499 F.2d 1147, 1153 (10th Cir. 1974).

Other governmental agencies have begun to recognize the critical relevance of these differences between unequal educational opportunity suffered by Chicanos (and other language and national origin-minorities) and unequal educational opportunity suffered by blacks. For example, in earlier proceedings, this Court relied upon reports of the United States Civil Rights Commission to find that Chicanos "suffer from the same educational inequalities as Negroes and American Indians." 413 U.S. at 197.

The two reports relied upon have now been augmented by four others, each showing that Chicanos also have unique problems of educational inequality that require different remedies.[13/]

An even more recent study has now been published by the Civil Rights Commission compellingly arguing that:

> Many language minority children are handicapped by poverty and discrimination before they even enter school, and although language is only one obstacle which they face in attempting to complete an education, it is a major one. Bilingual-bicultural education can remove much of the

13. U.S. Commission on Civil Rights, Mexican-American Education Study--Report I: Ethnic Isolation of Mexican Americans in the Public Schools of the Southwest (1971); Report II: The Unfinished Education (1971); Report III: Educational Practices Affecting Mexican Americans in the Southwest (1972) ; Report IV: Mexican American Education In Texas: A Function of Wealth (1972); Report V: Differences in Teacher Interaction With Mexican American and Anglo Students (1973); Report VI: Toward Quality Education for Mexican Americans (1974)

> burden for those children and thus put completion of an education within their grasp.
>
> . . . Bilingual-bicultural education . . . can provide one of the best means for diminishing such [ethnic] separation. Without full economic and social opportunity, language minority groups will almost certainly remain isolated, outside the American mainstream.

U.S. Commission on Civil Rights, A Better Chance to Learn: Bilingual-Bicultural Education (Clearinghouse Publication No. 51, May 1975), p. 141.

The Department of Health, Education and Welfare Office of Civil Rights recently published new guidelines on bilingual-bicultural education entitled:"Task Force Fundings Specifying Remedies Available for Eliminating Past Educational Practices Ruled Unlawful Under Lau v. Nichols." Appendix at pp. 330a-61a. These guidelines constitute a definitive interpretation of Title VI of the Civil Rights Act of 1964. In the

guidelines, HEW has recognized the need for development of comprehensive plans which require extensive investigation and remedies by school boards. For example, the guidelines provide for language identification, diagnosis, program selection and election, teacher requirements, racial/ethnic identification of schools and classes, notification to parents and students, and evaluation.

The panel of the Tenth Circuit in the instant case appears to have understood that a school district's obligation under Title VI is limited to provision of programs that meet the English language training needs of linguistic minority group students who cannot function even minimally in English. By contrast, the new HEW regulations mandate development of a variety of bilingual-bicultural programs for a continuum of language and national origin-minority group students to be placed in one of the following categories by language:

A. Monolingual speaker of a language other than English;
B. Predominantly speaks a language other than English;
C. Bilingual (speaks both English and another language);
D. Predominantly speaks English;
E. Monolingual speaker of English.

Appendix at pp.333a-34a.

Furthermore, Congress has now specifically declared that "the failure by an educational agency to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs" (20 U.S.C. § 1703(f)(Supp.), Appendix at p.290a), constitutes a litigable denial of equal educational opportunity. See 20 U.S.C. § 1706 (Supp.).

The State of Colorado, too, has now recognized that its language and national origin minorities require special attention to assure them equal educational opportunity. In June of

1975, Colorado enacted a Bilingual and Bicultural Education Act, which mandates comprehensive Bilingual and Bicultural education programs for every school having 50 or more students, or at least having 10% of the student body, in grades kindergarten through third grade with linguistically different skills. Appendix at p. 383a.

The Tenth Circuit rejected the compensatory education components of the District Court's plan due to its misreading of this Court's directions. It believed that this Court directed that Chicanos and blacks be treated precisely alike, and that neither should be entitled to compensatory education, in the course of converting a segregated school system into a unitary one. The fundamental error of the Tenth Circuit is revealed in the separate concurring opinion of Judge Seth, who observed:

> If there is segregation there imposed by the Board,

> as the Supreme Court indicates there is, it must receive the same treatment as in the black schools . . . The Supreme Court in its opinion ordering remand has directed that these students and the black students be considered together, and for this reason it must be done.

Appendix at p. 82a.

This Court, however, never stated that Chicanos and blacks should be treated as though they were the same for purposes of converting a de jure tri-ethnic segregated school system "to a unitary system in which racial discrimination would be eliminated root and branch." Green v. School Board of New Kent County, 391 U.S. 430, 437 (1968). The Court ruled only "that the District Court erred in separating Negroes and Hispanos for purposes of defining a 'segregated' school." Keyes, supra, 413 U.S. at 197. Further, in its previous opinion in the instant case, this Court specifically reserved decision upon:

> . . . the merits of the holding of the District Court, premised upon its erroneous finding that

> the situation "is more like de facto segregation", 313 F. Supp. at 73, that nevertheless, although all-out desegregation "could not be decreed . . . the only feasible and constitutionally acceptable program . . . is a system of desegregation and integration which provides compensatory education in an integrated environment." Id. at 96.

413 U.S. at 214 n. 18. This Petition brings before the Court the questions it reserved in the earlier proceedings, as well as other important questions. Certainly in the interest of clarifying the law on this subject, the Petition for Writ of Certiorari should be granted.

II. THE DECISION OF THE COURT OF APPEALS LIMITING THE EQUITABLE POWER OF THE DISTRICT COURT TO ELIMINATE DE JURE RACIAL DISCRIMINATION "ROOT AND BRANCH" WITHIN DENVER'S PUBLIC SCHOOLS IS INCONSISTENT WITH PRIOR CONTROLLING DECISIONS OF THIS COURT AND WITH DECISIONS OF OTHER CIRCUIT COURTS.

A. The Decision of the Court of Appeals Conflicts With Controlling Decisions of This Court Recognizing Vast Discretion in the Equitable Powers of the Trial Courts to Fashion Such Remedies as are Necessary to Eliminate "Root and Branch" System-Wide De Jure Racial Discrimination in a Single School System.

This Court has frequently passed upon the validity of various methods to desegregate unconstitutional dual racial school systems, and to convert them into constitutionally valid unitary school systems, by eliminating, "root and branch", de jure racial discrimination. It has established as constitutional policy a heavy reliance

on trial courts, recognizing that they must be given great latitude in formulating remedies commensurate with local circumstances.

In Brown v. Board of Education of Topeka, 347 U.S. 483 (1954) (Brown I), the Court declared the fundamental principle that racial discrimination in public education is unconstitutional. In the second round of that litigation, Brown v. Board of Education of Topeka, 349 U.S. 294 (1955) (Brown II), the Court addressed the question of remedying proven racial segregation and discrimination:

> Full implementation of the constitutional principles may require solution of varied local school problems . . . Because of their proximity to local conditions and the possible need for further hearings, the courts which originally heard these cases can best perform this judicial appraisal.

349 U.S. at 299. Clearly it was

understood that trial courts, guided by equitable principles, would have to deal with various considerations to assure compliance with constitutional requirements. "To that end, the [trial] courts may consider problems related to administration . . . and revision of local laws and regulations which may be necessary in solving the foregoing problems." 349 U.S. at 300.

The Court cautioned that school authorities have the primary responsibility of dealing with desegregation problems. Brown II, supra, 349 U.S. at 299. Accord: Green v. School Board of New Kent County, 391 U.S. 430, 439 (1968); United States v. Montgomery County Board of Education, 395 U.S. 225, 267 (1969). Thus school boards have repeatedly been charged with the affirmative duty to take whatever steps might be necessary "to convert to a unitary system in which racial discrimination [not merely physical racial segregation]

would be eliminated root and branch." Green, supra, 391 U.S. at 437-38. However, the trial courts are charged to "consider whether the action of school authorities constitutes good faith implementation of the governing constitutional principles." Brown II, supra, 349 U.S. at 299. Accord: United States v. Montgomery County Board of Education, supra, 395 U.S. at 227; Louisiana v. United States, 380 U.S. 145, 154 (1965).

The trial court's equitable powers are so extensive that it "may, if necessary to prevent further racial discrimination, require the Supervisors to exercise the power that is theirs to raise funds adequate to reopen, operate and maintain without racial discrimination, a public school system." Griffin v. County School Board of Prince Edward County, 377 U.S. 218, 233 (1964). Also, in Wright v. Council of the City of Emporia, 407 U.S. 451 (1972), the district court was allowed, under its

equitable remedial power, to prevent the establishment of a new school district, where it appeared that the primary purpose for its creation was to retain separation of the races.

Clearly, then, this Court generally prefers to defer to the district court's discretion in formulating a remedy, once unlawful discrimination has been established, unless the plan a trial court adopts "fails to provide meaningful assurance of prompt and effective disestablishment of a dual system." Green, supra, 391 U.S. at 438. Furthermore, the Courts of Appeals have been instructed not to interfere with such district court actions. See, e.g., United States v. Montgomery County Board of Education, supra, 395 U.S. 225.

Definitive standards for the exercise of the district court's discretion were articulated in Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971):

> Once a right and a violation have been shown, the scope of the district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies.

402 U.S. at 15.

Since the school board in Swann totally failed to come forward with an acceptable plan of its own, the district court properly turned to other qualified sources. This Court approved, stating that "the District Court proceeded to frame a decree that was within its discretionary powers, as an equitable remedy for the particular circumstances." Swann, supra, 402 U.S. at 25. Thus, the Court sanctioned the trial court's use of outside experts to fashion a plan of its own, and to make extensive use of various tools to implement its plan.

The only apparent limitation on the trial court in providing equitable relief through the use of remedial techniques concerns questions of whether implementation was "within the capacity of the school authority,

Swann, supra, 402 U.S. at 26, or could feasibly be implemented, since "[n]o per se rule can adequately embrace all the difficulties of reconciling the competing interest involved." Swann, supra, 402 U.S. at 26. The decree did not preclude more extensive remedies which may be reasonable, feasible, workable, effective, and realistic. Swann, supra, 402 U.S. at 31. Accord: Davis v. School Commissioners of Mobile County, 402 U.S. 33, 37 (1971).

This Court has expressly limited a trial court's equitable power to implement a comprehensive desegregation plan in only one case, and then by a vote of five to four. Milliken v. Bradley, 418 U.S. 717 (1974). In ruling that the District Court had overreached its power in Milliken, the Court built upon its decision in Swann, supra, where it had observed that "In seeking to define even in broad and general terms how far this remedial power extends it

is important to remember that judicial powers may be exercised only on the basis of a constitutional violation." 402 U.S. at 16. Hence, in a school desegregation case, just "as with any equity case, the nature of the violation determines the scope of the remedy." 402 U.S. at 16.

In Milliken, only the City of Detroit's school system was found to have violated the Fourteenth Amendment. Yet the trial court had ordered an inter-district pupil placement remedy, which would have imposed part of the burden of remedying Detroit's constitutional violation on separate and governmentally unrelated suburban school districts which had not been shown to have violated the Constitution. The Court ruled that, "without an interdistrict violation and interdistrict effect, there is no constitutional wrong calling for an interdistrict remedy." Milliken, supra, 418 U.S. at 745.

Notably, distinguishing the situ-

ation in Detroit from that of Denver in the instant case, the Court stated that Keyes v. School District No. 1, Denver, 413 U.S. 189 (1973) ". . . involved a remedial order within a single autonomous school district." Milliken, supra, 418 U.S. at 741 n. 19.

Indeed, the question addressed by the Court was limited, in Milliken, to determining "the circumstances in which a federal court may order desegregation relief that embraces more than a single school district." 418 U.S. at 741. Thus the decision does not limit the equitable power of a district court to fashion a comprehensive remedial plan to eliminate "root and branch" racial segregation and discrimination within a single school system proven guilty of system-wide discrimination.

Further, it was apparent in Milliken that this Court concluded that the trial court's interdistrict remedy unjustifiably restructured and consolidated "54 independent school districts [i.e., local governmental units]

historically administered as separate units into a vast new super school district." 418 U.S. at 743. Yet the trial court had not even addressed the serious governmental questions that would be presented by this consolidation. 418 U.S. at 743. None of these considerations is present in the instant case.

Thus, in all desegregation cases, the Court has emphasized the fact that circumstances support use of vast equitable discretion by the trial court. However, the Court has not yet determined the validity of any plan designed to dismantle a tri-ethnic segregation and discrimination situation. Review of the instant case will provide the Court with an important opportunity to clarify the extent to which a district court, having found system-wide and de jure tri-ethnic discrimination and segregation, may act to assure the "root and branch" elimination of the discrimination and conversion of the school system into a

unitary one in which equal educational opportunity is provided to all students. Green, supra, 391 U.S. at 437-38.

B. The Decision of the Court of Appeals Conflicts With Decisions of Other Circuits, Especially With Those of the United States Court of Appeals for the Fifth Circuit, Mandating Detailed and Comprehensive Tri-Ethnic School Desegregation Plans, Including Plans Which Provide for Bilingual-Bicultural and Other Compensatory Programs.

Unlike the Tenth Circuit, other Circuit Courts generally have mandated experimentation and implementation of comprehensive and detailed desegregation plans in bi-racial and tri-ethnic public school discrimination contexts. See, e.g., Morgan v. Hennigan, 379 F. Supp. 410, 482 (D. Mass. 1974), aff'd sub nom. Morgan v. Kerrigan, 509 F.2d 580 (1st Cir. 1975); Brewer v. School Board of City of Norfolk,

Virginia, 397 F.2d 37, 41 (4th Cir. 1968); Davis v. School District of Pontiac, Inc., 474 F.2d 46, 47 (6th Cir. 1973); United States v. Board of School Commissioners of Indianapolis, Inc., 474 F.2d 81, 85 (7th Cir.), cert. denied, 413 U.S. 920 (1973).

In particular, the Tenth Circuit decision in the instant case conflicts with numerous decisions of the Fifth Circuit. This conflict is especially significant in that the Fifth Circuit has dealt with desegregation matters to a greater extent than have the other circuit courts. Probably because Chicanos constitute the largest constitutionally identifiable ethnic minority in the State of Texas, the Fifth Circuit has also led the other circuit courts in treating discrimination against Chicanos and tri-ethnic public school segregation and discrimination. E.g., see Keyes v. School District No. 1, Denver, 413 U.S. 189, 197 (1973), where this Court relied

on several cases from Texas for its ruling "that Hispanos constitute an identifiable class for the purposes of the Fourteenth Amendment."[14]

The Fifth Circuit has generously described the spectrum of remedies to be considered by trial courts in desegregation cases. In United States v. Jefferson County Board of Education, 380 F.2d 385, 389 (5th Cir. 1967) (en banc), cert. denied, 389 U.S. 840 (1967), the court held that:

> If Negroes are ever to enter the mainstream of American life, as school children they must have equal educational opportunities with white children.

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14. The most recent Fifth Circuit decisions treating public school discrimination against Chicanos include: Zamora v. New Braunfels Independent School District, __F.2d.__(5th Cir. September 5, 1975) (No. 73-2999); United States v. Midland Independent School District, __F.2d__ (5th Cir. August 28, 1975) (No. 71-3271); Morales v. Shannon, 516 F.2d 411 (5th Cir. 1975); Tasby v. Estes, 517 F.2d 92 (5th Cir. 1975); Arvizu v. Waco Independent School District, 373 F. Supp. 1264 (W.D. Tex. 1973), aff'd in part, rev'd as to other issues, 495 F.2d 499 (5th Cir. 1974).

> . . . The necessity of overcoming the effects of the fual school system in this circuit requires integration of faculties, facilities and activities, as well as students.

Jefferson County, supra, 380 F.2d at 390. In the Jefferson County case, the Fifth Circuit formulated extensive instructions to its district courts, for use in adopting future desegregation plans. The instructions dealt with many facets of school administration and education, including, for example, provision for equalization of facilities and programs and implementation of remedial education programs.

In another notable case the Fifth Circuit sustained a district court decision requiring the Texas Education Agency and the State Commissioner of Education to fulfill "their affirmative obligations under Title VI of the Civil Rights Act of 1964 and the Fourteenth Amendment to the Constitution", "relating to the desegregation of public

elementary and secondary education within the State of Texas . . ." United States v. Texas, 447 F.2d 441, 442-43 (5th Cir. 1971), cert. denied, 404 U.S. 1016 (1972). The District Court has concluded that the state's duty was two-fold: "First, to act at once to eliminate by positive means all vestiges of the dual school structure throughout the state, and second, to compensate for the abiding scars of past discrimination." 447 F.2d at 443. The District Court's plan imposed substantial remedial obligations on the state officials, including many dealing with "curriculum and compensatory education." 447 F.2d at 448. With modifications not relevant to the issues in the instant case, the Fifth Circuit upheld the District Court's findings and plan. 447 F.2d at 441-42.

In subsequent proceedings in United States v. Texas, the relationship between a Chicano-Anglo pupil placement order and a bilingual-bicultural order was most extensively expli-

cated by the District Court and affirmed by the Fifth Circuit. United States v. Texas, 342 F. Supp. 24 (E.D. Tex. 1971), aff'd, 466 F.2d 518 (5th Cir. 1972). Although desegregation suits involving black and white students may provide guidelines in a similar case involving Chicano students, the District Court noted that the special circumstances of the Chicano students must be considered in providing remedies to their particular problem. the Court stated:

> Little could be more clear to the Court than the need for special educational consideration to be given to Mexican Americans in assisting them in adjusting to those parts of their new school environment which present a cultural and linguistic shock.

342 F. Supp. at 28.

Finding that the San Felipe del Rio Consolidated Independent School District constituted an illegally segregated school system, the District Court ordered the implementation of a

comprehensive education plan which included not only a pupil placement component but also an extensive bilingual-bicultural instructional program and other compensatory education components. 342 F. Supp. at 28-38. The plan imposed by the District Court was strikingly similar to the plan imposed by the trial court in the instant case. This similarity is not remarkable, for the San Felipe del Rio Plan, like the Intervenors' Plan in the instant case, was formulated by Dr. Jose Cardenas. See 342 F. Supp. at 28. The Fifth Circuit, however, unlike the Tenth Circuit, affirmed the District Court's implementation of the Cardenas Plan. 466 F.2d 518 (5th Cir. 1972).

Numerous other panels and District Courts in the Fifth Circuit have ordered the implementation of bilingual-bicultural education and other remedial or compensatory programs as a part and parcel of a desegregation case involving Chicano

students.[15] In United States v. Texas (Austin Independent School District), Civ. No. A-70-CA-80 (W.D. Tex. Aug. 1, 1973), pending on appeal (5th Cir. No. 73-3301), the trial court included in its plan a directive that Mexican American students be provided "a curriculum and special educational programs such as bilingual-bicultural education."

Similarly, in Arvizu v. Waco Independent School District, 373 F. Supp. 1264 (W.D. Tex. 1973), aff'd in part, rev'd as to other issues, 495 F.2d 499 (5th Cir. 1974), the court ordered the implementation of a plan that provided for a "sophisticated" bilingual-bicultural education program, 373 F. Supp. at 1280, designed to

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15. In its recent "Memorandum of Decision and Remedial Orders", in the Boston School Case, the United States District Court for the District of Massachusetts also stressed bilingual and compensatory education, especially "for Hispanic students and for others in need of this service." Morgan v. Kerrigan, __F. Supp. __(D. Mass. June 5, 1975) (Civ. No. 72-911-G), Slip Opinion at pp. 40-43, 65-67, 81-87, on appeal (1st Cir. Nos. 75-1184, 75-1195, 75-1197, 95-1212) (argued Sept. 12, 1975).

provide a scholastic environment receptive to Chicano students.

In Morales v. Shannon, 516 F.2d 411, 414-15 (5th Cir. 1975), rev'ing in part aff'ming in part, 366 F. Supp. 813 (W.D. Tex. 1973), a panel of the Fifth Circuit reversed a district court determination that there was no de jure segregation of Chicanos in the Uvalde, Texas school system. The panel also observed that since the lawsuit was filed, the State of Texas had by statute mandated bilingual-bicultural programs and the defendants had instituted such a program. The panel also concluded that, "It is now an unlawful educational practice to fail to take appropriate action to overcome language barriers." 516 F.2d at 415. Despite the panel's belief that the "entire question goes to a matter reserved to educators" (516 F.2d at 415), the case was also remanded for trial court examination of the program to determine whether it comported with legal requirements.[16/]

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16. Not only has this Court (Lau v. Nichols,

(footnote continued on next page)

This Court should grant the Writ of Certiorari to resolve the direct conflict between the Tenth and Fifth Circuits regarding the inclusion of bilingual-bicultural and compensatory education components in court-ordered deseg-

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16. (continued from preceeding page) 414.U.S. 563 (1974)) and the Fifth Circuit recognized that "it is an unlawful educational practice to fail to take appropriate action to overcome language barriers", but so has a panel of the Tenth Circuit. Serna v. Portales Municipal Schools, 499 F.2d 1147 (10th Cir. 1974). Relying on evidence of unequal educational opportunity similar to that which has been adduced on the record of the instant case, the court sustained a District Court decision that the plaintiffs had proved that they were the victims of unlawful educational practices. Specifically, the defendants were found to have "failed to institute a program which will rectify language deficiencies so that these [Spanish-surnamed children] will receive a meaningful education." 499 F.2d at 1154. In Serna, the district court had found the school system guilty of unlawful national origin discrimination but not classical segregation, both under

(continued next page)

regation plans, as well as the general conflict between the Tenth Circuit and the other Circuits regarding the district courts' equitable discretion to formulate comprehensive and workable plans to convert unlawfully segregated systems into "unitary system[s] in which racial discrimination would be eliminated root and branch", Green v. School Board of New Kent County, 391 U.S. 430, 437 (1968).

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16. (continued from preceeding page) the Fourteenth Amendment as well as Title VI of the Civil Rights Act of 1964. 499 F.2d at 1153. The Court of Appeals sustained the District Court only under Title VI and did not reach the Fourteenth Amendment question. In upholding the district court's bilingual-bicultural education plan, however, the Court of Appeals specifically employed standards for review of district court equitable powers formulated in desegregation cases. 499 F.2d at 1154.

III. DECISION OF THE COURT OF APPEALS IS INCONSISTENT WITH THIS COURT'S DECISIONS AND CONFLICTS WITH THE DECISIONS OF OTHER CIRCUIT COURTS IN THAT THE COURT OF APPEALS FAILED TO GIVE APPROPRIATE DEFERENCE TO GUIDELINES OF THE DEPARTMENT OF HEALTH, EDUCATION AND WELFARE FOR IMPLEMENTING A DESEGREGATION REMEDY.

Numerous decisions of this Court have recognized that the guidelines imposed by the Department of Health, Education and Welfare for compliance with Title VI of the Civil Rights Act of 1964,[17/] are the bare minimum standards to be imposed by courts when they

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17. Title VI prohibits exclusion from participation in, denial of benefits of, and discrimination under federally assisted programs on grounds of race, color, or national origin. § 2000d. It also authorizes HEW to effectuate these provisions. § 2000d-1. The Commissioner of Education is under a duty to withold funding from any educational agency for non-compliance with the act. § 2000d-5.

order public school desegregation under the Fourteenth Amendment. See, Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 16 (1971); Green v. County School Board, 391 U.S. 430, 433 (1968). See also, Lau v. Nichols, 414 U.S. 563 (1974).

Similarly, the Fifth Circuit has placed great emphasis on HEW standards. For example, in Singleton v. Jackson, 348 F.2d 729, 731 (5th Cir. 1965), that court stated:

> There should be close correlation . . . between the judiciary's standards in enforcing the national policy requiring desegregation of schools and the executive department's standards in administering the policy.

For several reasons, the Fifth Circuit correctly believes that HEW guidelines should be used as the minimum standards to be imposed by courts in desegregation cases: (1) to promote uniform policy of desegregation; (2) to prevent

school boards from circumventing HEW requirements and; (3) to avoid the possibility that courts will handle cases on an ad hoc basis. Singleton, supra, 348 F.2d at 731. See also, e.g., United States v. Texas Education Agency, 467 F.2d 848, 860 (5th Cir. 1972); United States v. Texas, 447 F.2d 441, 446 (5th Cir. 1971), cert. denied, 404 U.S. 1016 (1972); United States v. Jefferson County Board of Education, 380 F.2d 385, 390 (5th Cir. 1967) (en banc), cert. denied, 389 U.S. 840 (1967); United States v. Jefferson County Board of Education, 372 F.2d 836, 886 (5th Cir. 1966).

Lau v. Nichols, 414 U.S. 563 (1974) involved the San Francisco School District, which had been found guilty, in earlier proceedings, of racial discrimination and had had a system-wide desegregation plan imposed on it.[18] In Lau

18. Johnson vs. San Francisco, 339 F. Supp. 1315 (N.D.Ca.) petition for stay denied sub nom. Guey Hueng v. Johnson, 404 U.S. 1215 (1971), remanded, 500 F.2d 349 (9th Cir. 1974).

the Court addressed the plight of the large number of San Francisco students of Chinese ancestry who are non-English speaking and were receiving no instruction designed to rectify their inability to function in English. This Court concluded that the defendants were under an affirmative legal requirement to provide programs addressed to these students' language disabilities.[19/]

The Lau decision was based upon Title VI of the Civil Rights Act of 1964, rather than on constitutional grounds; however, the Lau case serves to emphasize the fact that trial courts should consider the needs of linguistic and national origin-minorities in implementing a desegregation remedy. Moreover, in Lau, this Court expressly relied upon and validated the 1970 HEW regulations, which were promulgated

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19. In Serna v. Portales Municipal Schools, 499 F.2d 1147 (10th Cir. 1974), a panel of the Tenth Circuit, following this Court's lead, sustained under Title VI a court-ordered bilingual-bicultural education plan designed to redress the unequal educational opportunities suffered by Mexican-American children.

under Title VI. 414 U.S. at 566-69; id., 414 U.S. at 571 (Steward, J., Burger, C.J., and Blackmun, J., concurring). These regulations were designed to impose an affirmative obligation on school districts receiving federal funds to operate programs to rectify language deficiencies of linguistic minority group members. 35 Fed. Reg. 11595, Appendix at pp. 319a-23a. See also, § 204(f) of the Equal Educational Opportunity Act of 1974, 20 U.S.C. § 1703(f)(Supp.), Appendix at pp. 288a-90a, which now makes it an unlawful educational practice to fail "to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs."

During the past summer, HEW promulgated extensive new regulations, entitled "Task Force Findings Specifying Remedies Available for Eliminating Past Educational Practices Ruled Unlawful Under Lau v. Nichols" (Appendix at

pp. 330a-61a), and transmitted these regulations to the chief school officer of each of the States (Appendix at pp. 324a-30a). These regulations, which are quite consistent with the plan ordered by the District Court in the instant case, [20] require the offering of bilingual-bicultural education to linguistic and national origin minority group students through a variety of comprehensive programs designed to meet the needs of students of varying English language ability.

The District Court's plan in the instant case is not only fully consistent with the controlling HEW regulations, the plan is also consistent with HEW's actions in conducting Title VI school desegregation compliance reviews. HEW compliance reviews are not limited to pupil placement and allied matters: they deal with a broad spectrum of responsibilities imposed on school officials

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20. Dr. Jose A. Cardenas, upon whose plan the District Court relied in the instant case to formulate its plan, was a member of the HEW Task Force which produces the new regulations.

to eliminate discrimination based on language and cultural differences. These obligations range from requiring the School District to meet the language needs of its students, to providing notice of meetings to parents in a language they can understand. Further, the HEW compliance plans now require affirmative action hiring, in-service training of teachers, counselors and administrators, curriculum modifications and employment of bilingual personnel. See generally, U.S. Commission on Civil Rights, Report VI: Toward Quality Education for Mexican Americans at 135 (1974).[21]

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21. For an account of the HEW compliance plan for the Socorro School District in Texas, see Report VI, supra, at pp.166-67. For accounts of the comprehensive plans imposed by HEW in places such as El Paso and Beeville, Texas, after employing Dr. Cardenas as an expert, see Tr. 1063.

In the Matter of Board of Education of Uvalde Independent School District, Administrative Proceeding, Department of Health, Education and Welfare (Docket No. S-47, July 24, 1974) (Final Decision of Reviewing Authority), the Office for Civil Rights held an extensive administrative hearing concerning segregation of Chicano students and a school district's failure to provide an equal educational opportunity program. The respondents there, as the defendants in the instant case, argued that they had no duty to provide bilingual education because there was no evidence that the absence of bilingual education was the result of de jure segregation. The reviewing authority of the Office for Civil Rights held that the absence of bilingual-bicultural education constitutes unlawful discrimination against Mexican American students. See, Morales v. Shannon, 516 F.2d 411, 415 n.1 (5th Cir. 1975). In parallel judicial proceedings, the Fifth Circuit has remanded the case to

the trial court to determine if, presumably in the light of HEW standards, the "defendants are engaging in discriminatory practices in the [bilingual-bicultural] program as it currently exists." 516 F.2d at 415.[22/]

This Court should grant the writ of certiorari in the instant case to further clarify the deference courts are to accord to HEW guidelines when courts desegregate public school systems which include substantial language and national origin minority group students.

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22. Dr. Cardenas was called as an expert witness in the Uvalde, Texas case, both in the HEW proceedings and in the court proceedings. (See Tr. 1024.)

IV. THIS CASE RAISES IMPORTANT QUESTIONS OF WHETHER THE DEFENDANTS' SYSTEMATIC FAILURE TO RESPOND TO THE EDUCATIONAL NEEDS OF CHICANO PUBLIC SCHOOL STUDENTS DENIED THEM EQUAL EDUCATIONAL OPPORTUNITY UNDER THE FOURTEENTH AMENDMENT AND TITLE VI OF THE CIVIL RIGHTS ACT OF 1964, WHICH HAVE NOT BEEN, BUT OUGHT TO BE, RESOLVED BY THIS COURT.

At least, when a state, like Colorado (See, e.g., CRS 123-21-3, quoted in 380 F. Supp. at 696 n. 3, Appendix at p. 205a n. 3) makes it the central mission of its public schools to insure that all students achieve a master of English, under Title VI of the Civil Rights Act of 1964, school authorities have the affirmative duty to rectify any English language deficiency "[w]here inability to speak and understand the English language excludes national origin-minority group children from effective participation in the educational program offered by a school district." 35 Fed. Reg. 11595 (1970). See Lau v. Nichols, 414 U.S. 563 (1974); Serna v.

Portales Municipal Schools, 499 F.2d 1147 (10th Cir. 1974). As this Court has recognized:

> Under these state-imposed standards there is no equality of treatment merely by providing students with the same facilities, textbooks, teachers, and curriculum; for students who do not understand English are effectively foreclosed from any meaningful education.

414 U.S. at 566. Further, HEW's latest regulations implementing Title VI, in this context, clearly impose obligations to treat affirmatively English language disabilities, even when the national origin-minority group children involved are able to speak and understand the English language, although not as well as their Anglo school mates. (Appendix at pp. 319a-23a.)

In 1962 an official Denver Special Study Committee on Equality of Education Opportunity found there was inequality in the educational opportunity offered

to racial minorities in the Denver schools. 303 F. Supp. at 283. Although the School Board then adopted various policy resolutions designed to implement changes recommended by the Special Study Committee, the resolutions were ultimately rescinded. See 303 F. Supp. at 284, 285. Thereafter, no substantial affirmative action was taken by the defendants to alleviate the problems of national origin minorities in the Denver area. 303 F. Supp. at 284-286. On the basis of these actions and the rest of the record in this case,[23] but without specifically holding that the school board had violated Title VI, the trial court twice found all the elements of a Title VI violation, and concluded that the minority students were unlawfully denied the opportunity to participate equally with Anglo students in the Denver school system's educational programs. As the District Court found: "The educational

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23. The evidence bearing upon these issues is summarized in the Statement of the Case, supra, at pp.13-17, 20, 25-42.

opportunity in the minority schools has been proven in our present trial as well as in previous trials to be inferior to that in the majority schools." 380 F. Supp. 673, 682 (1974). Compare the language employed by this Court in finding the Title VI violation in Lau v. Nichols, supra, 414 U.S. at 566, 568.

Evidently, not even the Colorado legislature believes that existing programs are satisfactory to provide equal educational opportunities for language and national origin-minority students. During the pendency of the appeal in the instant case, the Colorado legislature enacted the comprehensive 1975 "Bilingual and Bicultural Education Act" to provide for the sort of education which would assure to these children an equal educational opportunity. Appendix at pp. 362a - 416a.

Thus, under the state-imposed standards for education within Colorado,

and this Court's decision in Lau, there was an ample basis in the record of the instant case for finding a violation of Title VI. Furthermore, in view of the new Colorado "Bilingual and Bicultural Education Act" and the new comprehensive HEW guidelines implementing Title VI in the instant kind of a case (Appendix at pp. 330a-61a), the District Court's decree does not overstep the scope of a proper remedy.

There is also a sufficient basis on the record for the District Court's findings that the defendants' failure to provide programs designed to afford the minority group children in Denver an equal educational opportunity constitutes a violation of the Fourteenth Amendment, somewhat independent of the proven de jure segregation. See, e.g., 313 F. Supp. 61, 73 (1970), issue reserved, 413 U.S. 189, 214 (1974).

Since this Court did not consider the relationship between Title VI and the Fourteenth Amendment in Lau, the

Court should now clarify the relationship, particularly in light of this Court's decision in Katzenbach v. Morgan, 384 U.S. 641 (1966). In that case, the Court stated, "We emphasize that Congress' power under §5 [of the Fourteenth Amendment] is limited to adopting measures to enforce the guarantees of the Amendment; §5 grants Congress no power to restrict, abrogate or dilute these guarantees." 384 U.S. at 651 n. 10. It is clear under this rationale that while Congress may expand constitutional guarantees under the Fourteenth Amendment, it may not contract them. It follows that in adopting Title VI, and in authorizing HEW to promulgate guidelines to effectuate it, Congress was properly expressly on the constitutional guarantees of the Fourteenth Amendment. This being the case, HEW guidelines should be considered the minimum constitutional standards to be applied in Fourteenth Amendment cases, and particularly in the instant case.

Further, in recently enacting the Equal Educational Opportunity Act of 1974, 88 Stat. 514, 20 U.S.C. §§1701 et seq. (Supp.) (See Appendix, at pp. 284a-91a), Congress specifically expressed its policy to further enforce Fourteenth Amendment equal protection guarantees. The Act in part states,

> § 1702(a). The Congress finds that
>
> > (1) the maintenance of dual school systems in which students are assigned to schools solely on the basis of race, color, sex, or national origin denies to those students the equal protection of the laws guaranteed by the fourteenth amendment. . .
>
> § 1703. No State shall deny equal educational opportunity to an individual on account of his race, color, sex, or national origin by . . .
>
> > (f) the failure of an educational agency to take appropriate action to overcome language barriers that impede equal participation by its students in instructional programs.

Given this Court's holding in Katzenbach v. Morgan and the clear congressional intent to enforce constitutional guarantees through enactment of Title VI and the Equal Educational Opportunity Act of 1974, the Court of Appeals' decision raises serious constitutional questions.

Under the Fourteenth Amendment, the Denver school system must provide educational programs responsive to the needs not only of Anglos or blacks but also of Chicano children. Identical treatment of patently different groups may well not produce the "equality" mandated by our Constitution. See, e.g., Williams v. Rhodes, 393 U.S. 23 (1969). In Lau, supra, 414 U.S. at 568, this Court recognized that providing equal programs and facilities does not provide equality "where inability to speak and understand the English language excludes national origin-minority group children from effective participation in the educational program. . . ." The Court should now

consider whether the instant case may well present a situation in which equal treatment of two different constitutionally identifiable minority groups may deprive one group of equal protection under the Fourteenth Amendment. Previously, this Court has rejected the argument that provision of similar curricula and facilities was sufficient to satisfy the Equal Protection Clause, since the Court did not consider these the sole measures of equal educational opportunity. McLaurin v. Oklahoma State Regents 339 U.S. 637 (1950).

Certainly, the District Court's decision is in keeping with the policy established by this Court. The District Court based its decision on substantial evidence of the racial and national-origin composition of the student population of Denver, and various ethnic factors in the areas such as curriculum, instruction and guidance, administration and organization, and school-community relations. The District Court also

repeatedly found that the administration was aware of these conditions, but that they failed to take steps to rectify them. E.g., 303 F. Supp. 279, 284 (1969); 303 F. Supp. 289, 295 (1969); 313 F. Supp. 61, 65 (1970). On the Record of this case the Court should consider the Fourteenth Amendment and Title VI issues presented, and the Court should consider the interrelationship between the Fourteenth Amendment and Title VI.

CONCLUSION

For the foregoing reasons, the writ of certiorari should be granted.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM 1975

No. 75- 701

SCHOOL DISTRICT NO. 1, DENVER, COLORADO, *et al.*,
Petitioners,

vs.

WILFRED KEYES, *et al.*,
Respondents.

No. 75- 702

CONGRESS OF HISPANIC EDUCATORS, *et al.*,
Petitioners,

vs.

SCHOOL DISTRICT NO. 1, DENVER, COLORADO, *et al.*,
Respondents.

Separate Joint Appendix to Petitions for Writs of Certiorari to the United States Court of Appeals for the Tenth Circuit, of School District No. 1, Denver, Colorado, *et al.*, and of the Congress of Hispanic Educators, *et al.*

INDEX

U.S. C.A., 10th CIR. ORDER DENYING PETITIONS FOR REHEARING (SEPT. 16, 1975).....1a

OPINION OF UNITED STATES COURT OF APPEALS, TENTH CIRCUIT (AUG. 11, 1975).....2a

U.S. D.C. D. COLO. FINAL JUDGMENT AND DECREE (APRIL 17, 1974).....92a

U.S. D.C. D. COLO. MEMORANDUM OPINION AND ORDER (APRIL 8, 1974, April 24, 1974)...122a

U.S. D.C. D. COLO. MEMORANDUM OPINION AND ORDER (DEC. 11, 1973).....270a

UNITED STATES CONSTITUTION AMENDMENT XIV, §§ 1 & 5.....283a

THE EQUAL EDUCATIONAL OPPORTUNITIES ACT OF 1974, 88 STAT. 514 20 U.S.C. (SUPP.) §§ 1701, 1702, 1703, 1706, 1708, 1712.....284a

TITLE VI OF THE CIVIL RIGHTS ACT OF 1964, 78 STAT. 249, 42 U.S.C. § 2000d et seq.....292a

45 C.F.R. PART 80 - NONDISCRIMINATION UNDER PROGRAMS RECEIVING FEDERAL ASSISTANCE THROUGH THE DEPARTMENT OF HEALTH, EDUCATION AND WELFARE

EFFECTUATION OF TITLE VI OF
THE CIVIL RIGHTS ACT OF 1964
(§ 80.3(b))....301a

33 FED. REG. 4955 (MARCH 23, 1968)
§ 1-810....305a

THE MAY 25, 1970 MEMORANDUM
(35 FED. REG. 11595, JULY 18,
1970)....319a

DEPARTMENT OF HEALTH, EDUCATION,
AND WELFARE - MEMORANDUM FOR
CHIEF STATE SCHOOL OFFICERS -
SUBJECT: EVALUATION OF VOLUNTARY
COMPLIANCE PLANS DESIGNED TO
ELIMINATE EDUCATIONAL PRACTICES
WHICH DENY NON- ENGLISH LANGUAGE
DOMINANT STUDENTS EQUAL EDUCA-
TIONAL OPPORTUNITY....324a

DEPARTMENT OF HEALTH, EDUCATION,
AND WELFARE - TASK FORCE FINDINGS
SPECIFYING REMEDIES AVAILABLE FOR
ELIMINATING PAST EDUCATIONAL
PRACTICES RULED UNLAWFUL UNDER
LAU v. NICHOLS, SUMMER 1975....330a

1975 COLORADO BILINGUAL AND BICULTURAL
EDUCATION ACT....362a

[UNITED STATES COURT OF APPEALS
TENTH CIRCUIT]

SEPTEMBER TERM - SEPTEMBER 16, 1975

Before The Honorable David T. Lewis, Chief Judge, The Honorable Oliver Seth and The Honorable James E. Barrett, Circuit Judges

WILFRED KEYES, etc., et al., Plaintiffs-Appellees and Cross Appellants.	)	No. 74-1349
vs.	)	74-1350
SCHOOL DISTRICT NUMBER ONE, DENVER COLORADO, etc., et al., Defendants-Appellants and Cross Appellees.	)	74-1351

This matter comes on for consideration of the petitions for rehearing filed by the appellants, School District Number One and the Plaintiff-Intervenor, Hispanic Educators, in the captioned appeals.

Upon consideration whereof, it is the order of the Court that the petitions for rehearing are denied.

[signed] HOWARD K. PHILLIPS
Clerk

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

WILFRED KEYES, et al.,

Plaintiffs-Appellees-Cross Appellants,
(Number 74-1350)

versus

SCHOOL DISTRICT NUMBER ONE,
Denver, Colorado, et al.,

Defendants-Appellants-Cross Appellees,
(Number 74-1350)

CITIZENS ASSOCIATION FOR NEIGHBORHOOD SCHOOLS, an unincorporated association,

Intervenor-Appellee-Appellant,
(Number 74-1351)

CONGRESS OF HISPANIC EDUCATORS, et al.,
MONTBELLO CITIZENS' COMMITTEE, INC.,
MOORE SCHOOL COMMUNITY ASSOCIATION AND
MOORE SCHOOL LAY ADVISORY COMMITTEE,
UNITED PARENTS OF NORTHEAST DENVER,
a non-profit corporation, et al., and
CONCERNED CITIZENS FOR QUALITY EDUCATION,

Intervenors.

COLORADO ASSOCIATION OF SCHOOL BOARDS;
COLORADO ASSOCIATION OF SCHOOL EXECUTIVES;
STATE BOARD OF EDUCATION,
STATE OF COLORADO, Amici Curiae.

Number 74-1349
Number 74-1350
Number 74-1351

(District Court Number C-1499)

August 11, 1975

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Before LEWIS, Chief Judge;
SETH and BARRETT, Circuit Judges.

LEWIS, Chief Judge.

These combined cases reach this court by appeal following remand directly to the district court by the Supreme Court, Keyes v. School District No. 1, Denver, Colorado, 413 U.S. 189. After extensive hearings the trial court entered its judgment, 368 F. Supp. 207. All parties appeal with typical inflexibility of position, understandably, perhaps, because of the great complexity of the problem and the inevitable intrusion of naked emotion and worrisome economic problems. Public objectivity is not to be even hoped for and judicial objectivity is difficult indeed. Although we do not affirm the judgment of the trial court in its entirety we do recognize that court's objective and the stern effort to follow the law and the complete necessity of the court's rejection of the various

plans advocated by the subjectively interested parties. And to place the orders of the district court in perspective, we will summarize the course of litigation in these cases from their inception in 1969, giving particular attention to the terms of the Supreme Court's remand. We will then consider whether the district court properly concluded that segregative acts of the defendant School Board during the 1960s render the entire Denver school system an illegal dual system. Next, we will take up challenges to those portions of the court's remedial order concerning the reassignment and transportation of students. Finally, we will consider portions of the court's order dealing with the institution of bilingual-bicultural education in Denver schools, combination of East and Manual High Schools on a campus basis, and faculty and staff desegregation.

I.

In 1969 the plaintiffs sought a preliminary injunction against the School

Board's implementation of its Resolution 1533, which would have effectively rescinded the Board's previously formulated desegregation plan for schools in Denver's Park Hill area. In granting the preliminary injunction, 303 F.Supp. 279 the trial court found that during the previous decade the School Board had willfully undertaken to maintain and intensify racial segregation in Park Hill Schools. The trial court based this finding upon proof (1) that the Board established Barrett School in 1960 to contain the eastward movement of the black population in northeast Denver; (2) that the Board ignored official study committee proposals in 1962 and 1966 for the rezoning of attendance areas in order to minimize the effects of de facto segregation; (3) that the Board employed 28 of the district's 29 mobile classrooms in the Park Hill area to contain an overflow of black students; (4) that the Board added eight new classrooms at Hallett School also to contain an expanding black student body; (5) that in 1962 and 1964 the Board manipulated school boundaries in Park Hill and thereby further isolated black school children;

(6) that the Board staffed minority schools with disproportionately high numbers of probationary teachers, teachers with less than ten years' experience, and minority teachers. In a supplemental opinion, 303 F.Supp. 289, the trial court held that the Board's Resolution 1533 constituted a further act of de jure segregation. The trial court again enjoined implementation of Resolution 1533 and further ordered boundary changes in keeping with the Board's previously formulated desegregatic policy.

At the trial on the merits, plaintiffs alleged acts of de jure segregation both in Park Hill and in Denver's central or core city area. In its memorandum opinion, 313 F.Supp. 61, the trial court reaffirmed its position that the Board willfully followed a policy of racial concentration and isolation in Park Hill in violation of the rights of minority school children. With respect to the core city schools, however, that court determined minority concentrations did not result from affirmative conduct on the part of the Board; rather, black and Hispano concentrations in these schools

stemmed from long-established housing and population patterns and from the Board's racially neutral "neighborhood school" policy. The court held, however, that irrespective of the causes of segregation in the core city, these schools unconstitutionally provided inferior education for their minority students. The trial court made final its preliminary injunction reinstating Resolutions 1520, 1524, and 1531, pursuant to which the Board was to eliminate segregation in Park Hill's predominantly black schools and to stabilize the racial composition of schools in transition. In a subsequent opinion, 313 F.Supp. 90, the district court ordered the desegregation of core city schools and the institution of a program of compensatory education for minority students.

On appeal, this court affirmed the trial court's conclusion that the Board's actions in Park Hill during the 1960s amounted to de jure segregation in violation of minority students' rights to equal protection of the laws. 445 F_2 990. We did, however, reverse the district court's ruling that the Board's maintenance of de facto segregated schools in

the core city transgressed the fourteenth amendment. Absent proof of affirmative Board action leading to segregated conditions, this court held, maintenance of educationally inferior segregated schools does not provide grounds for relief under the Constitution. In this connection, we stated that:

> [W]here no type of state imposed segregation has been established, the burden is on plaintiff to prove by a preponderance of the evidence that the racial imbalance exists and that it was caused by intentional state action. Once a prima facie case is made, the defendants have the burden of going forward with the evidence. 445 F_2 at 1006.

However, we affirmed the trial court's conclusion that plaintiffs failed to make a prima facie case as respects the core city schools.

The Supreme Court granted plaintiffs' petition for certiorari and ultimately overturned this court's rulings relating to the existence of actionable segregation in core city schools. 413

U.S. 189.[1] The High Court observed that where school authorities are proved to have "carried out a systematic program of segregation affecting a substantial portion of the students, schools, teachers, and facilities within the school system, it is only common sense to conclude that there exists a predicate for a finding of the existence of a dual school system." 413 U.S. at 201. The Supreme Court reasoned that the purposeful concentration of minority students in certain schools has the reciprocal effect of keeping other schools predominantly Anglo. Certainly natural boundaries or peculiarities in the geographic structure of a school district may prevent the district-wide impact of segregative acts directed at a portion of the district; but, as the Supreme Court acknowledged, such cases must be

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1. The Court denied defendants' cross-petition for certiorari to review judgments of this court affirming the Final Decree of the trial court relating to Park Hill schools. Keyes v. School District No. 1, 413 U.S. 189, 195.

rare. The Court then held that in the absence of a determination that the school district is naturally fractionalized into separate, identifiable and unrelated units, "proof of state-imposed segregation in a substantial portion of the district will suffice to support a finding by the trial court of the existence of a dual system." 413 U.S. at 203/[2]

The Supreme Court, then, established the presumption that the School Board's segregative acts in a substantial portion of the school district renders the entire district a dual system. At this point we must observe that the compulsion of the Court's opinion does not preclude the

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2. In part III of its opinion, the Supreme Court held that a finding of intentionally segregative School Board action in a meaningful portion of the school system establishes a prima facie case of unlawful segregative design with respect to all segregated schools in the system. 413 U.S. at 208. Given the district court's dispositoin of the case on remand, however, we do not consider this portion of the Supreme Court's opinion to carry a further mandate.

Board from rebutting this presumption with proof that the racial compositions of predominantly Anglo schools surrounding areas of minority concentration have been unaffected by the Board's segregative acts. The presumption of system-wide impact, however, derives from the pervasive interrelationship between school policy and the community's development; it is therefore not easily rebutted. The manipulation of attendance areas, the construction of new schools and classrooms, and the assignment of faculty and staff, all for racial effect, profoundly influence subsequent housing and population patterns throughout the district. In order to rebut the presumption of district-wide segregatory effect, the Board's proofs must negate these presumed intangible influences.

The Supreme Court directed the district court, on remand, first to afford the School Board opportunity to prove that the "Park Hill area is a separate, identifiable and unrelated section" of the district. In the event that the Board should fail in this proof, the district court was directed, second, to determine

whether the Board's conduct in deliberately segregating Park Hill schools "constitutes the entire school system a dual school system." If the Denver school system is determined to be a dual system, the Corut directed that the Board should assume the "affirmative duty to desegregate the entire system 'root and branch'."

On remand from the Supreme Court, the parties initially presented evidence bearing on the existence of a dual school system in Denver. In its Memorandum Opinion and Order, 368 F.Supp. 207, the district court held, first, that the School [District] failed to establish that Park Hill is geographically separate or isolated from the rest of the school district. Second, the court held that the segregative acts of the Board in Park Hill constitute the rest of the district a dual scholl system. In this respect, the court considered the absence of non-geographic factors isolating Park Hill schools from those in the rest of the district. The court also noted Park Hill's similarity to adjacent areas in terms of available public services, social characteristics and spatial layout.

Plaintiffs' evidence established to the court's satisfaction that the Board's intentional segregation in Park Hill substantially affected schools outside the area. On December 17, 1973, the court ordered the parties to submit plans for the desegregation of the entire School District No. 1. After a trial at which the court considered each of the tendered plans, the court determined that each was inadequate and commenced its own independent study. The result was the court's adoption of its own plan, 380 F.Supp. 673, which was contained in a Final Decree and Order dated April 17, 1974.

II.

We consider first whether the trial court properly concluded that the School Board's proven segregative acts in Park Hill during the 1960s renders the entire Denver school system a dual system. The principal issue of dispute during trial concerned the types of evidence admissable to rebut the presumption that the Board's acts resulted in system-wide violation of

the Fourteenth Amendment. The School Board conceded that no geographical boundaries separated Park Hill from the rest of the district. Likewise, the Board did not challenge plaintiffs' evidence that schools throughout the district, including Park Hill, were administered in the same way and that Park Hill is not distinguishable from surrounding neighborhoods by non-geographical factors. Dispute arose, however, when the School Board tendered evidence on the absence of any causal relation between its proven acts of segregation in Park Hill and current levels of racial and ethnic concentration throughout the district. Plaintiffs argue that proof of actionable system-wide segregation must be presumed from the Board's segregative acts in a substantial portion of the school district, subject only to rebuttal in the form of proof of the isolation of the portion of the district to which the proven acts were directed. Plaintiffs argued both at trial and on appeal that the Board's evidence of the absence of extraterritorial effect was irrelevant under the terms of the Supreme Court's mandate. Although the

trial court admitted and considered the Board's evidence, it was of the view that proof of extra territorial effect was somewhat beside the point; the court viewed the principal issue on remand as whether the Board's segregative intent with respect to the entire district could be inferred from its Park Hill actions.

We believe, however, that the Board's evidence concerning extraterritorial effect was relevant to the issues raised on remand. The Supreme Court explained the posture of the case as follows:

> [C]ommon sense dictates the conclusion that racially inspired school board actions have an impact beyond the particular schools that are the subjects of those actions. This is not to say, of course, that there can never be a case in which the geographical structure of, or the natural boundaries within, a school district may have the effect of dividing the district into separate, identifiable and unrelated units. Such a determination is essentially a question of fact to be

> resolved by the trial court in the first instance, but such cases must be rare. In the absence of such a determination, proof of a state-imposed segregation in a substantial portion of the district will suffice to support a finding by the trial court of a dual system. 413 U.S. at 203.

The Board's evidence concerning extraterritorial effect bore importantly on the issue whether Park Hill is a "separate, identifiable, and unrelated unit" within the district and was properly received by the court below.

We also believe that the court could properly conclude, as it did, that the Board's evidence on the issue of extraterritorial effect was "merely conclusory and lacking in substance." 368 F.Supp. at 210. The Board's evidence consisted entirely of the testimony of E. Bruce Slade, a statistician, who conducted a study of percentage variations in the racial compositions of Denver's school student bodies between 1962 and 1968, and of percentage variations in the racial compositions of school-age population on a

neighborhood basis between 1960 and 1970. From these statistics, Mr. Slade concluded that neither the School Board's 1969 recission of its own desegregation policy nor its construction of Barrett School in 1960 had any impact on racial concentrations in schools outside Park Hill. Regardless of the course taken by the School Board, he testified, independent, demographic trends would have resulted in the same levels of black, Hispanic and Anglo concentrations in the Denver schools. Mr. Slade generally concluded that the Board's acts in Park Hill had no impact on the racial composition of the schools outside Park Hill between 1960 and 1970.

With the testimony of three of their own experts, plaintiffs attacked Mr. Slade's conclusions on essentially three fronts. First, the defendants' evidence of the absence of extraterritorial effect rested entirely upon statistical data and ignored the interplay, which the Supreme Court noted, between the Board's policy designating certain schools as being for black or Anglo children and the movement of families into the neighborhoods of Denver. Second, Mr. Slade's

choice of school-by-school racial percentages as an indication of concentration trends ignored the overall decrease, between 1969 and 1970, in Denver's Anglo population and the increase, during the same period, of Denver's black population. Thus, although black school children constituted a slightly increasing portion of school student bodies outside Park Hill, nevertheless black pupils attending schools outside Park Hill constituted a decreasing fraction of Denver's total black school-age population. Third, in postulating the outcome of the Board's alternatives to construction of Barrett School as a receptable [sic] for a recently migrated black population in northeast Denver, Mr. Slade failed to consider alternatives available to the Board of a genuinely integrative nature. In this way, Mr. Slade's calculations avoided measuring the segregative impact of Barrett's construction.

The trial court's findings of fact will not be set aside on appeal unless they are clearly erroneous. Rule 52(a), Fed. R. Civ. P. On the basis of our review of the record, we cannot say that the trial court erred either in choosing to disbelieve the School Board's evidence or in concluding that the Board failed to overcome plaintiffs' prima facie case establishing the existence of a dual system in Denver. Although

the trial court experienced difficulty in interpreting the Supreme Court's opinion, the facts as found by the trial court nevertheless support a ruling favorable to the plaintiffs under a correct reading of the High Court's opinion. An appellate court will affirm the rulings of the lower court on any ground that finds support in the record, even where the lower court reached its conclusions from a different or even erroneous course of reasoning. Jaffke v. Dunham, 352 U.S. 280.

The School Board next argues that because the trial court proceeded from an incorrect view of the issues on remand, it erroneously excluded certain of the Board's tendered testimonial and documentary evidence. We disagree and will examine each of the challenged evidentiary rulings in turn.

First, the School Board challenges the court's rulings on Mr. Slade's testimony concerning the construction of Barrett School. The Board claims that the court received this portion of Mr. Slade's testimony only insofar as it reflected the Board's motivation in portions of the city outside Park Hill; the court, it is argued, incorrectly refused to consider

the evidence insofar as it proved the absence of any racial effect on pupil populations outside Park Hill. A close reading of the record indicates, however, that the court ultimately received the Board's evidence for the precise purpose for which the Board offered it. Initially, the court stated that Mr. Slade's testimony regarding Barrett School would be received "only insofar as it might have some probative value in showing the motivation of the Board." A discussion between defendants' counsel and the court ensued, after which the court appears to have modified its ruling to exclude Mr. Slade's testimony only insofar as it (1) proved the good faith of the Board with respect to the Park Hill schools and (2) went to issues already adjudicated in the case's 1969 decision. Defendants' counsel then stated that he had no objection to this ruling and Mr. Slade's testimony resumed. At the close of direct examiniation, plaintiffs' counsel moved to strike all of Mr. Slade's testimony as irrelevant. The court replied that the testimony would be disregarded insofar as it bore upon issues resolved in earlier litiga-

tion, which we understand to mean (1) the Board's good faith with respect to Park Hill schools and (2) the effect within Park Hill of the Board's segregative acts. Again defendants' counsel replied in substance that he had no objection to the court's ruling.

The court's rulings on Mr. Slade's testimony are concededly confusing. But the language of the court's written memorandum convinces us that the court fully considered Mr. Slade's testimony on the issue whether "segregated conditions... outside the Park Hill area are wholly the product of external factors such as demographic trends and housing patterns, and are in no way the product of any acts or omissions by defendants." 368 F.Supp at 210. The Board's present challenge to these court rulings is therefore without foundation.

The Board next challenges the court's exclusion of testimony intended to show that certain of its proven segregative acts in 1964 had no effect on the racial compositions of schools within the Park Hill area, and, by inference, could not have had a similar effect on school popu-

lations outside Park Hill. The Board conceded that this evidence would be inadmissible insofar as it went solely to the absence of segregative effect inside Park Hill, since that issue was resolved in earlier decisions of the court. The Board urged its relevance, however, to the probable effects of the Board's actions on schools outside Park Hill. The court rejected the evidence, we believe properly, on grounds of its remoteness to the issues before the court.[3] At any rate, the remoteness of evidence is a matter within the discretion of the trial judge, see, e.g., International Shoe Machinery Corp. v. United Shoe Machinery Corp., 1 Cir., 315 F_2 449, cert.

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3. The court observed that the defendants offered the testimony of a Mrs. Ortez and certain documentary evidence to prove that the Board's acts in 1964 "had no segregative effect outside of the Park Hill area." Then the court stated: "My ruling is that it doesn't prove that. In order for a circumstance to have probative value it must give rise to some deductive result, and I don't see that what you have offered makes it along that line."

den., 375 U.S. 820, and we do not believe the court in the present case abused its discretion.

Finally the Board contends that the trial court erroneously excluded the testimony of the superintendent of Denver's schools, Dr. Kishkunas, concerning present conditions in the system. Dr. Kishkunas was to testify that at the time of the hearing Denver's was not a "dual system" as the phrase is defined in cases given him to study.[4] Specifically he was to evaluate the Denver system in light of what he considered to be classic indicators of duality, including state-enforced separation of races, exclusion of students from schools solely on the basis of race, and designation of schools along racial lines by reference

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4. Dr. Kishkunas testified that in preparing for his testimony he sought "the most definitive information as to what a definition of a 'dual system' is," and he was led to Swann v. Charlotte-Mecklenburg Board of Educ., 402 U.S. 1; Alexander v. Holmes County Board of Educ., 396 U.S. 19; and Green v. County School Board of New Kent County, 391 U.S. 430.

to faculty composition and differences in transportation services, extracurricular activities, buildings, and so on. The court refused this testimony because it bore upon current conditions rather than conditions in the school system as of the initial hearings of the case in 1969

We belive that under the terms of the Supreme Court's remand the district court properly rejected Dr. Kishkunas' testimony. In its Keyes opinion the Supreme Court considered for the first time the legality of segregation in schools that have never operated under constitutional or statutory provisions which either mandated or permitted racial or ethnic segregation of students. In pre-Keyes cases of de jure segregation, the existence of a dual system was directly inferred from state-enforced separation of races or ethnic groups. See, e.g., Swann v. Charlotte-Mecklenburg Board of Educ., 402 U.S. 1; Alexander v. Holmes County Board of Educ., 396 U.S. 19. In Keyes, however, the Court confronted a different variety of intentional, system-wide segregation, to be inferred from

segregative acts of school authorities and their expected repercussions on racial compositions of schools in the system; a search for the usual explicit indicators of the existence of a dual system cannot reveal, in a case like the present one, the state's hand in causing racial or ethnic concentrations in schools. Rather courts must presume the existence of a dual system from school authorities' segregative acts, the burden then shifting to those authorities to prove the absence of any causal relation between those acts and currect [sic] levels of racial segregation.[5]

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5. Recent lower court decisions involving alleged state-caused segregation in northern school districts have interpreted Keyes in the same way. In Morgan v. Hennigan, D.Mass., 379 F.Supp. 410, 425, aff'd sub nom., Morgan v. Kerrigan, 509 F_2 580, Judge Garrity wrote:

> The Boston public school system is thus characterized by racial segregation. The defendants do not dispute this central fact. The dispute, rather, is now [sic] the schools have become and remained that way.

5. continued

> The court's primary task is to determine whether the defendants have intentionally and purposefully caused or maintained racial segregation in meaningful or significant segments of the...system, in violation of the Fourteenth Amendment. (Emphasis added.)

In Oliver v. Kalamazoo Board of Educ., W.D.Mich., 368 F.Supp. 143, 185, aff'd, 508 F_2 178, the court stated:

> The fact that many public and private institutions made deliberate and substantial contributions to neighborhood and school segregation in Kalamazoo does not excuse the State Board of Education...for [its] violation of the Constitution ....
>
> [T]he state will not be held legally responsible if it has only occasionally committed segregative acts and these acts are of trivial importance and bear no relation to the modern situation. (Emphasis added.)

368 F.Supp. at 159

We note that the court below did not exclude all evidence of current conditions in the Denver schools. Indeed, most of the testimony before the court dealt with current similarities between schools and community life in Park Hill and those outside Park Hill, or with current levels of racial concentration within and without Park Hill. Far from excluding relevant facts arising after 1969, the district court properly admitted evidence of the relationship between the Board's segregative acts during the 1960s and current racial conditions. Under the terms of the Supreme Court's remand, this was the sole issue for trial. Although Dr. Kishkunas' testimony may have been probative of the proper remedy for segregated conditions in Denver, nonetheless it did not bear on the issue remanded to the trial court. The court therefore properly rejected it as irrelevant.

III.

In hearings conducted in February

and March 1974, the district court considered one desegregation plan submitted by the School District, two plans submitted by the plaintiffs, and a plan submitted by the court's consultant, Dr. John A. Finger. In Appendix A and Appendix B, infra, we summarize the plans of the parties and the court's objections to them. Before considering specific challenges to the court's remedial orders, we briefly summarize the Finger Plan as adopted and modified by the court.

The Court's Plan

The Finger Plan seeks to desegregate Denver's elementary schools in three ways. First, 24 schools would be rezoned. Second, 23 other schools would be rezoned and would receive students from satellite attendance areas. Third, approximately 37 schools would be organized in pairs or clusters for purposes of part-time reassignment of students on a classroom basis.[6]

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6. Eighteen predominantly minority schools would be involved in part-time pairing. Thirteen of these schools presently have Anglo enrollments of less than 10% .

The part-time pairing component of the court's program requires transportation of children, excluding kindergarten students, from their home schools to a receiving school for half-day plus the lunch period. These children would then be returned to their neighborhood schools for the remainder of the day. An individual child would be in a "receiving" class on some days and would be part of a "sending" class on other days. The court anticipated that details of pairing could be worked out in one of several ways. For example, grades one, three, and five from a minority school might be transported to its paired counterpart, which would be predominantly Anglo. Upon arrival students would be taught in integrated classrooms. At the same time grades two, four, and six from the predominantly Anglo school would be transported to the minority school. After lunch, students would travel back to their home schools. The court expressed its preference for another variant of the plan entailing transportation of approximately half the minority students in a grade to the paired school on al-

ternating days or on alternating weeks. In this way each paired school would retain grades one through six. Such grade-splitting, moreover, would enable school authorities to avoid the useless busing of Anglo students to predominantly Anglo schools and minority students to predominantly minority schools. Should its part-time pairing plan prove too burdensome or disruptive, the court observed, school authorities could easily convert to full-time pairing. The court's principal justification for part-time pairing was the desirability of anchoring students and parents to a neighborhood school, which would continue to serve as the focus for student extracurricular and community functions.

The court's plan would rezone all junior and senior high schools in Denver. In addition, twelve junior high schools and eight senior high schools would receive students from satellite attendance areas.

At the outset, the court adopted as its desegregation guideline a range of from 40% to 70% Anglo enrollment for each elementary school, and a "somewhat

higher" minimum Anglo enrollment figure for secondary schools. Under the Finger Plan, eight elementary schools would have anglo enrollments below 40%; with respect to five of these schools, the court justified departure from its guidelines on grounds of the schools' inaccessibility and the desirability of continuing or instituting bilingual-bicultural programs at predominantly Hispano schools. Projected junior high school enrollments range from 43.1% to 75.7% Anglo. Projected high school enrollments range from 42.5% to 80.1% Anglo. Estimates of the total number of students transported to schools under the Finger Plan range from 15,870 to 24,103. It is likely under any estimate that a disproportionate number of minority students would be bused.[7]

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7. Dr. Finger projected that his plan would require busing of 15,870 students; 69.9% of these would be minority students, and 39.1% would be Anglo. The School Board later estimated that the Finger Plan would require busing of 24,103 students; the Board did not break this figure down as to race. In its memorandum opinion and order, the district

Did the district court properly employ Anglo-minority enrollment percentages as guidelines in shaping its remedy?

In Milliken v. Bradley, 418 U.S. 717, the Supreme Court reaffirmed the long-established proposition that the scope of any school desegregation remedy is necessarily determined by the nature and extent of the constitutional violation. See also 20 U.S.C. §1712; Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 16. In the present appeal, the School Board challenges the district court's remedy on the ground that system-wide application of Anglo-minority enrollment percentages exceeded any proven constitutional violation. The Board argues that since the constitutional violation before the district court was premised upon segregative acts in a single corner of the school district, the remedy should be accordingly limited.

We disagree. Whether a school system is illegally segregated by reason

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court stated that the Finger Plan, as adopted, would result in the busing of "about 20,000 students or slightly more." 380 F. Supp. at 686.

of statutory separation of the races or by reason of past segregative acts of school authorities, the scope of the remedy must in either case be system-wide. Citing Green v. County School [Board] of New Kent County, 391 U.S. 430, 438, a case involving statutory school segregation, the Supreme Court in Keyes directed:

> If the District Court determines that the Denver school system is a dual school system, respondent School Board has the affirmative duty to desegregate the entire system "root and branch." 413 U.S. at 213.

Elsewhere the Court stated that where the district court concludes from the School Board's conduct in significant portions of the district that a dual system exists, then, "as in cases involving statutory dual systems, the school authorities have an affirmative duty 'to effectuate a transition to a racially nondiscriminatory school system.'" 417 U.S. at 203 (citing Brown v. Board of Education, 349 U.S. 294, 301 (Brown II)). (Empahsis added.)

Despite these directions the School Board urges us to adopt special remedial standards for cases of non-statutory de jure dsegregation and to limit the remedy to direct results of the Board's segregative acts in Park Hill. We believe the Board's suggestion would saddle the plaintiffs, in the remedy phase of their case, with the burden of proving de jure segregation as to each and every school in the system. The Court's opinion in Keyes plainly forbids us from requiring as much.[8] The district

8. Nor do we believe that the Supreme Court's recent decision in Milliken v. Bradley, 418 U.S. 717, in any way limits the district court's remedial powers in this case. The precise issue there concerned "the validity of a remedy mandating cross-district or interdistrict consolidation to remedy a condition of segregation found to exist in only one district." 418 U.S. at 744. The Court explicitly distinguished Keyes on the ground that Keyes "involved a remedial order within a single autonomous district." 418 U.S. at 741 n. 19.

court therefore properly dealt with the entire Denver system in fashioning its remedy.

We also believe the district court correctly avoided the narrow reliance upon district-wide racial and ethnic averages proscribed in Swann. In seeking an acceptable student desegregation plan, the court necessarily adhered to broad percentage guidelines based on projected racial-ethnic compositions of school student bodies. In Swann the Supreme Court held that ethnic ratios and percentages may properly be used as a starting point in shaping a remedy. 402 U.S. at 24-25. In the present case, the district court's consideration of such factors as the desirability of "walk-in" integration and neighborhood contact with schools demonstrate the court's disinclination to engage in a numbers game at the expense of legitimate community and educational needs.

The School Board also contends that the court's plan arbitrarily and unnecessarily alters attendance areas of Denver schools already integrated. The Court's rezoning of some 46 schools that presently meet the court's expressed

guidelines for desegregation will undoubtedly disrupt the lives of families and cause school authorities inconvenience. Yet we are unable to say that the court acted arbitrarily or needlessly. Many of the court's boundary changes are minor and appear to reflect adjustments of computer data, which located students by race and grade in geographical grids, to Denver streets. More substantial boundary changes are the inevitable result of the court's attempt to maximize "walk-in" integration or to make room for student transfers from satellite attendance areas. Such adjustments are unavoidable in developing a system-wide remedy; the complexity of the court's task, we believe, argues for broad discretion in formulating the details of a satisfactory plan. See Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 15-16. The School Board has not pointed to any specific instance in which the court's rezoning plan fails rationally to relate to the court's task of correcting, "by a balancing of the individual and collective interests, the condition that offends the constitution."

Swann, supra, 402 U.S. at 16. In the absence of a more specific challenge to the court's methods, we must conclude that the court acted within the limits of its remedial powers.[9]

Is the court's part-time pairing plan constitutionally adequate?

We hold that the part-time pairing component of the court's remedy for desegrega-

9. The School Board also argues that the district court erred in failing to make specific findings as to the efficacy, in the present case, of certain non-busing remedies, as required by section 214 of the Equal Educational Opportunities Act of 1974, 20 U.S.C. §1713. That Act became effective 60 days after its passage on August 21, 1974. Since the district court entered judgment with respect to its remedial orders on April 17, 1974, the Act did not apply in the present cases. We believe, however, that in any event the court's findings substantially comply with the requirements of section 214.

tion of elementary schools is not constituttionally acceptable as a basic and permanent premise for desegregation but deem that practicality negates the necessity of invalidating in toto this aspect of the trial court's judgment at this time. We read this innovation as recognized by the trial court as an adjunct to be tolerated only as such under the temporary conditions of the present and as a step toward total integration.

Although the district court's remedial discretion is broad, it is necessarily bounded by the constitutional requirement that the court make "every effort to achieve the greatest possible degree of actual desegregation, taking into account the practicalities of the situation." Davis v. [Board] of School Commissioners of Mobile County, 402 U.S. 33, 37. In examining the record and the district court's opinion, we find no insurmountable practical impediment to full-time desegregation. Indeed both the court and its consultant Dr. Finger were of the view that part-time classroom pairing would easily convert to a full-time program. The court's part-

time plan offers some of the most severely segregated schools in the district only part-time desegregation; of the eighteen predominantly minority schools in the part-time program, thirteen have projected enrollments of less than ten percent Anglo pupils.[10] Under the circumstances a partial solution for these schools is not enough.

The claimed advantage of the court's part-time desegregation program over the same program run full-time is continuous neighborhood contact with school facilities. Part-time pairing offers easier access to school inasmuch as each student would attend his neighborhood school for at least a portion of every day. The neighborhood school arguably would remain viable as an afterschool playground and as the focus for extracurricular and parent activity.[11] Although we acknowledge such neighborhood contact to be important, we cannot place it above the constitutional rights of children to attend desegregated schools. We perceive those rights to include full-time attendance in a desegregated setting.

Footnotes 10. and 11. on next two pages.

10. The projected home school enrollments of the eighteen minority schools participating in part-time pairing are as follows:

School	Minority No.	Minority %	Anglo No.	Total
Mitchell	525	97.0	16	541
Crofton	210	93.7	14	224
Barrett	271	92.2	23	294
Whittier	225	97.0	7	232
Columbine	269	98.9	3	272
Stedman	228	97.1	7	235
Eagleton	310	67.2	151	461
Bryant-Webster	321	83.2	65	386
Greenlee	256	91.4	24	280
Fairview	256	92.8	20	276
Gilpin	314	98.1	6	320
Hallett	404	96.2	16	420
Wyatt	321	96.1	13	334
Harrington	445	95.7	20	465
Smith	851	98.8	10	861
Smedley	357	79.3	93	450
Fairmont	344	78.0	97	441
Remington	279	75.8	89	368
	6,186		674	6,860

A part-time program of the precise kind adopted by the court has never before been tested against the constitutional standards of Swann or its predecessors. Referring to a line of cases involving somewhat different part-time desegregation schemes, the Fifth Circuit noted: "[T]his court has...assidiously adhered to the proposition that part-time desegregation, while a salutary adjunct of desegregation plans, cannot be used as a substitute for the complete dismantling of a segregated school system." Arivizu v. Waco Independent School District, 5 Cir., 495 F_2 499, 503. In United States v. Texas Education Agency, 5 Cir., 467 F_2 848, the Fifth Circuit rejected en banc an elementary school

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11. Full-time integration of Denver's elementary schools would not, of course, prevent neighborhood contact with nearby school facilities. It is likely that students would be able to attend their neighborhood schools for four of seven elementary grades. Paired schools would likely organize PTA and extracurricular programs and would use both "sending" and "receiving" school facilities for these purposes.

desegregation plan for students from segregated minority and white schools to meet for one week per month in an integrated setting for planned activities. As in the present case, basic subjects including reading and mathematics were to be taught in the segregated schools of original assignment. The court said, "We consider this interaction of Mexican American, black, and white students an excellent idea for improving the group relationship, but it does not desegregate schools." 467 F_2 at 859. In Dowell v. Board of Education of the Oklahoma City Public Schools, 10 Cir., 465 F_2 1012, this court affirmed the district court's rejection of a plan requiring only voluntary, periodic exchanges of students between Anglo and minority schools. See also United States v. Board of Education of Webster Co., Ga. 5 Cir., 431 F_2 59; Hightower v. West, 5 Cir., 430 F_2 552, 557.

In the present case, the court's part-time pairing plan would leave most participating minority schools intensely segregated during periods of instruction in basic subjects. Since we believe this lapse would seriously deprive mi-

nority pupils of an education equal to that provided in the District's other schools, we must remand for implementation of a full-time desegregation program within a reasonable time and in accord with changing conditions.

Does the court's reassignment plan impermissibly burden minority students?

Plaintiffs contend that the court's adopted reassignment plan impermissibly burdens minority students with the impact of long-distance busing. The plaintiffs do not contend that the law requires exact equality in allocating busing assignments as between minority and Anglo students, but they challenge as unfair provisions in the Finger Plan that require transportation of approximately 1,000 minority students from Denver's core city (Satellite F area) to seven schools in extreme southern portions of the city. Both the court and Dr. Finger acknowledged that these students would bear a heavy burden in bringing about Denver's desegregation; accordingly, the Finger Plan makes special provision to ease the hardships of long-distance busing.[12]

12. The Finger Plan requires provision

We noted earlier that the complexity of the court's task in balancing a multitude of competing considerations in order to arrive at an equitable desegregation plan argues for allowance of broad discretion on review. Such discretion, of course, does not justify discrimination against minority students without clear justification, see Arivizu v. Waco Independent School District, 5 Cir., 495 F_2 499, 504, but we are convinced that no such invidious discrimination occurred here. Based on Dr. Finger's projections, the court's overall transportation plan does not unfairly burden minority students.[13] Nearly all of the elementary students who are to be bused

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of extra buses to pick up stragglers, transportation for students between home and school necessitated by emergencies, and transportation for parents wishing to attend PTA and other activities at school.

13. Minority students presently constitute approximately 42% of the District's total students [sic] population; approximately 60% of all pupils bused under the Finger Plan would be minority.

long-distance to the southern portion of the district will attend neighborhood high schools and junior high schools; likewise, elementary school pupils in the extreme southeast and southwest portions of the city will be ultimately bused to junior high schools in the central and northeastern portions of the city. Although the plaintiffs' plans would have allocated the burdens of transportation more evenly between minority and Anglo children, these plans would have required substantially more transportation overall.[14] We cannot say that the court erred in striking the balance in a way different from plaintiffs' plan.

Did the court properly leave certain Predominantly Hispano schools segregated?

Under the district court's order, five elementary schools would be left with minority enrollments ranging between 77% and 88%.[15] The court justi-

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14. See Appendix B to the present opinion.

15. Boulevard....88% minority
Cheltenham...80% minority
Del Pueblo...77.9% minority

fied the continued segregation of the students in four of these schools -- Cheltenham, Del Pueblo, Elyria, and Garden Place -- on grounds of the schools' inaccessibility and the institution or continuation of bilingual-bicultural programs. 380 F.Supp. at 692, 717. The court offered no justification for the continued segregation of students at Boulevard School.

In Swann, supra, the Supreme Court held that:

> [I]n a system with a history of segregation the need for remedial criteria of sufficient specificity to assure a school authority's compliance with its constitutional duty warrants a presumption against schools that are substantially disproportionate in their racial composition. 402 U.S. 1, 26.

In our view, the five schools noted are "substantially disproportionate in their racial composition," within the Court's meaning. The continued segregation of students at these schools must therefore

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Elyria.....77.3% minority
Garden Place..83.7% minority

be justified either on the ground that practical or other legitimate considerations render desegregation unwise, or on the basis of proof that the racial compositions of these schools is not the result of past discriminatory action on the part of the Board. See Swann, supra, 402 U.S. at 26.

Given our reversal, infra, of the district court's adoption of the Cardenas Plan, institution of that Plan cannot justify continued segregation of any of the noted schools. Bilingual education, moreover, is not a substitute for desegregation. Although bilingual instruction may be requried to prevent the isolation of minority students in a predominantly Anglo school system, see Lau v. Nichols, 414 U.S. 563; Serna v. Portales Municipal Schools, 10 Cir., 499 F_2 1147, such instruction must be subordinate to a plan of school desegregation.

We therefore remand this portion of the case for a determination whether the continued segregation of students at the five mentioned schools may be justified on grounds other than the institution and development of bilingual-bicultural

programs at the schools. "The district judge...should make every effort to achieve the greatest possible decree of actual desegregation and will thus necessarily be concerned with the elimination of one-race schools." Swann, supra, 402 U.S. at 26.

IV.

We now consider claims of the School Board that certain aspects of the district court's order -- other than those having to do with student reassignments and transportation considered above -- transgressed the limits of the court's power to fashion a desegregation remedy for the Denver school system.

The Cardenas Plan

Intervenor Congress of Hispanic Educators (CHE) submitted to the court a plan for the bicultural-bilingual education of minority children in Denver authored by Dr. Jose A. Cardenas. In its April 17, 1974 Final Judgment and Decree the district court ordered school authorities to implement, on a pilot basis,

either the Cardenas Plan "or a plan substantially and materially similar thereto and incorporating to the extent feasible the proposals set forth in the Addendum to the Cardenas Plan." The court ordered establishment of the pilot program at Del Pueblo, Cheltenham, Garden Place, and Swansea Elementary Schools, at Baker Junior High School, and at West High School.

The Cardenas Plan is premised on the theory that the poor performance of minority children in public schools results from "incompatibilities" between cultural and developmental characteristics of minority children on the one hand, and the methods and expectations of the school system on the other. Because most school systems are operated to meet the needs of middle-class Anglo children, the theory continues, they inevitably fail to meet the different needs of poor minority children. Conflicts between the Anglo system and the needs of minorities are pervasive. The Cardenas Plan therefore requires an overhaul of the system's entire approach to education of minorities; its proposals extend to matters of educational philosophy, governance,

instructional scope and sequence, curriculum, student evaluation, staffing, non-instructional service and community involvement. The Plan also proposes a mechanism for comprehensive monitoring of the program's status. Continuing evaluation by ten "Equal Educational Opportunity Committees," each composed in part of persons from outside the school system, is necessary, according to the Plan, because the school system itself "lacks accountability." In the Addendum to the Cardenas Plan, intervenor CHE details how the Plan would be applied in Denver. These proposals, it must be emphasized, touch virtually every aspect of curriculum planning, methodology and philosophy presently the responsibility of local school authorities. CHE proposes, for example, the inclusion of specific courses in the curriculum, adoption and publication of specific educational principles, provision of early childhood education (beginning at age three) and adult education for minorities, and provision of adequate clothing for poor minority school children.

Plaintiffs and CHE contend that in-

clusion of the Cardenas Plan in the court's order may be justified on either of two grounds. First, the Plan is necessary to effectuate meaningful segregation in the schools. School authorities, it is argued, must be forced not only to establish a receptive scholastic environment for minority students in order to eradicate the very evil at which Brown v. Board of Education, 347 U.S. 483 (Brown I) and subsequent cases have been directed, that is, isolation of minority students in an essentially alien school system. This appears to be the rationale of the court below for inclusion of the Plan in its remedy.[16] Second, it is argued, the Cardenas Plan corrects the School Board's failure to provide an equal educational opportunity for minority children. In an earlier

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16. The district court stated:
> [M]eaningful desegregation must be accompanied by some appropriate alterations of existing educational programs in order to adequately deal with new problems which will arise in the operation of desegregation rather than segregated schools. 380 F. Supp. at 695.

phase of this case, the district court found that Denver's predominantly minority schools provided students with an inferior education;[17] this, plaintiffs argue, constitutes a separate violation of the fourteenth amendment to which the

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17. In 1970, the district court examined 15 predominantly minority schools in Denver and concluded:

> The evidence in the case at bar establishes...that an educational opportunity is not being provided at the subject segregated schools.... Many factors contribute to the inferior status of these schools, but the predominant one appears to be the enforced isolation imposed in the name of neighborhood schools and housing patterns. 313 F.Supp. 61., 83.

The court held that the maintenance of inferior segregated schools violated the rights of students to equal protection of the laws, irrespective of whether the segregated conditions resulted from state action. Id. This court reversed the district court on the ground that the federal courts are powerless to resolve

Cardenas Plan is reasonably directed. We belive, however, that under either rationale the district court's adoption of the Cardenas Plan oversteps the limits of its remedial powers.

Courts have the power to effectuate their remedial orders by removing all obstacles to meaningful desegregation. Brown II, supra, 349 U.S. at 299-300. The equitable power to order relief adjunct to desegregation is limited, however, by considerations that loom significantly in the present case. One of these, as we have noted, is the extent of the proven constitutional violation and its relationship to the ordered relief. On remand from the Supreme Court, the district court determined that specified actions of the School Board in the Park Hill area of Denver constitute the entire school system a dual system.

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educational difficulties arising from circumstances outside the ambit of state action. 445 F_2 990,1004-05. Plaintiffs submitted this issue to the Supreme Court but the Court did not reach it. See 413 U.S. 189, 214 n. 18.

The court made no finding, on remand, that either the School District's curricular offerings or its methods of educating minority students constituted illegal segregative conduct or resulted from such conduct. Rather the court determined that since "many elementary school Chicano children are expected ...to acquire normal basic learning skills which are taught through the medium of [an] unfamiliar language," a meaningful desegregation plan must provide for the transition of Spanish-speaking children to the English language. 380 F.Supp. at 695. But the court's adoption of the Cardenas Plan, in our view, goes well beyond helping Hispano school children to reach the proficiency in English necessary to learn other basic subjects. Instead of merely removing obstacles to effective desegregation, the court's order would impose upon school authorities a pervasive and detailed system for the education of minority children. We believe this goes too far.

Other considerations lead us to the same conclusion. Direct local control

over decisions vitally affecting the education of children "has long been thought essential both to the maintenance of community concern and support for public schools and to the quality of the educational process." Milliken v. Bradley, 418 U.S. 717, 741, 742; Wright v. Council of the City of Emporia, 407 U.S. at 451, 469. Local control permits citizen participation in the formulation of school policy and encourages innovation to meet particular local needs. Educational policy, moreover, is an area in which the courts' "lack of specialized knowledge and experience counsels against premature interference with the informed judgments made at state and local levels." San Antonio Independent School District v. Rodriguez, 411 U.S. 1,42. The policy of the state of Colorado is to encourage local school districts to develop bilingual skills and to assist in the transition of non-English-speaking students to English.[18] The state legislature has established a comprehensive program for the education of children of migrant workers[19]

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18. 1973 Colo. Rev. Stat. §22-1-103.

19. Id. §22-23-101 et seq.

and has mandated the teaching of minority group history and culture in all public schools.[20] Denver school authorities maintain a variety of programs for assistance of children who have learning difficulties because they come from non-English-speaking families.[21] We believe that the district court's adoption of the Cardenas Plan would unjustifiably interfere with such state and local attempts to deal with the myriad economic, social, and philosophical problems connected with the education of minority students.

The clear implication of arguments in support of the court's adoption of the Cardenas Plan is that minority stu-

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20. Id. §22-1-104.

21. The School Board operates a Diagnostic Teaching Center desinged to facilitate in non-English-speaking students "maximum growth of the English language for communication and verbal expression and to maintain pride in [their] language and culture." The Board also maintains an early childhood English program and bilingual education programs in certain elementary and junior high schools.

dents are entitled under the fourteenth amendment to an educational experience tailored to their unique cultural and developmental needs. Although enlightened educational theory may well demand as much, the Constitution does not. In San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 35-37, the Supreme Court held that education is not a right protected by the Constitution except, perhaps, insofar as some minimal quantum of education may be necessary to enable the exercise of the basic rights of speech and voting. Of course, where the state has undertaken to provide an education to its citizens, it must be made available to all on equal terms. Brown I, supra, 347 U.S. at 483. But the plaintiffs and intervenor in the present case argue for a right to differential treatment of minority children in the educational process. As the Court stated in Rodriguez:

> [E]very reform that benefits some more than others may be criticized for what it fails to accomplish. But we think it plain that, in substance, the thrust of the [state's

> educational] system is affirmative and reformatory and, therefore, should be scrutinized under judicial principles sensitive to the nature of the State's efforts.... 411 U.S. at 39.

Thus we refuse to affirm the court's adoption of the Cardenas Plan on the second ground urged by the parties, that is, that the school's alleged failure to adapt to the cultural and economic needs of minority students amounts to a violation of the fourteenth amendment.

Neither Lau v. Nichols, 414 U.S. 563, nor this court's holding in Serna v. Portales Municipal Schools, 10 Cir., 499 F_2 1147, is contrary to our position. Both of these cases stopped short of reaching any constitutional issue. In both, school authorities were held, rather, to have violated section 601 of the 1964 Civil Rights Act, 42 U.S.C. §2000d, in failing to provide language instruction to substantial numbers of non-English-speaking children enrolled in public schools.[22]

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22. Plaintiffs attempt to support adoption of the Cardenas Plan with allega-

We vacate that portion of the district court's order that would require the School Board to implement the Cardenas Plan or a plan substantially similar to it. We remand for a determination of the relief, if any, necessary to ensure that Hispano and other minority

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tions that the School Board has violated section 601 with respect to non-English-speaking students. We note that in the 1973-74 school year, Denver school authorities identified 344 students in the system with language difficulties arising from their Spanish-speaking backgrounds. School authorities determined that 251 of these students needed special help in acquiring language skills necessary to function satisfactorily in school. A number of programs were directed to the needs of these students. On the basis of these facts and after reviewing the record, we are unable to find any support for a violation of section 601. Even if such a violation were supported by the record, moreover, we believe the Cardenas Plan would, for reasons we have indicated, overstep the scope of a remedy properly directed to the violation.

children will have the opportunity to acquire proficiency in the English language.

Establishment of the East-Manual Complex

In addition to altering the respective attendance areas of East and Manual High Schools to achieve at each an Anglo enrollment of approximately 55%, the district court ordered the consolidation of the two schools into a campus complex. The court reasoned as follows:

> It is believed that Manual could profit by being associated on a campus basis with East High, whereby teachers could be exchanged and the students could take some of their courses at one or the other school. Each school should, of course, have its own administrative staff, but there must be also an overall supervisor of the two schools plus a supervisory staff capable of determining the course offering and transportation needs as well as co-ordination of the two schools. This would furnish an opportunity to create a joint educational effort unmatched in this city and in this

> part of the country -- an institution with the very highest educational standards. 380 F.Supp. at 691.

Although the court later characterized creation of the East-Manual complex "an essential and highly important part of the desegregation programs at East High School and Manual High School," 380 F. Supp. at 726, our review of the record does not disclose any reason why the court's action is essential to the desegregation of either. Rather the court appears to have acted solely according to its own notions of good educational policy unrelated to the demands of the Constitution.

We do not dispute the wisdom of combining East and Manual High Schools as a matter of sound educational policy. But we believe that the court lacked the power to do so given the limitations on its remedial jurisdiction described, supra, with respect to its adoption of the Cardenas Plan. The task of operating the schools, we reemphasize, is for local school authorities; in cases like the present one, courts may order changes

in the school system only to relieve a constitutional violation or to remove obstacles to such relief. Creation of the East-Manual complex is justified on neither ground. We therefore vacate that portion of the court's order.

Desegregation of Faculty and Staff

During the 1973-74 school year, disproportionate numbers of the Denver school system's minority teachers were assigned to schools with high concentrations of minority students.[23] Despite the District's institution of a minority recruitment program in recent years, the percentage of minority faculty members in the system has not increased appreci-

23. Forty-five percent of the system's black elementary teachers were assigned to the seventeen elementary schools with Anglo enrollments of less than 20%. Approximately 68% of the system's Hispano elementary school teachers were assigned to the same schools. Higher percentages of the system's minority junior high and high school teachers were assigned to predominantly minority schools.

ciably.[24] Of the view that faculty desegregation is essential to the process of school desegregation, the district court ordered the District to assign its personnel so that, in each school, the ratio of minority teachers and staff to Anglo teachers and staff shall not be less than 50% of the ratio of minority to Anglo staff in the entire system. The School Board does not dispute the propriety of this component of the court's remedy. The court also ordered that all reductions in the number of staff members and all demotions and dismissals of staff members be carried out pursuant to non-discriminatory criteria, and that the written criteria for such actions be available for public inspection. Finally the court ordered implementation of a program for the recruitment of minority teachers, staff and administrators. As a goal, the court ordered the District to achieve ratios of Hispano and black personnel to Anglo that "reflect more truly" the ratios of Hispano and black students to

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24. In 1969, 7.06% of the system's teachers were black; 2.16% were Hispano. In 1973, 8.83% were balck and 3.6% were Hispano.

to Anglo students in the District. In this respect the court stated, "The defendants need not lower their employment standards but must justify any failure to make substantial progress towards the goal." April 17, 1974 Final Judgment and Decree.

Contrary to the School Board, we believe that these measures to ensure faculty desegregation were properly part of the court's order. Faculty and staff desegregation is an "important aspect of the basic task of achieving a public school system wholly free from racial discrimination." United States v. Montgomery County [Board] of Education, 395 U.S. 225, 231-32. See also Bradley v. School [Board] of City of Richmond, 382 U.S. 103; Rogers v. Paul, 382 U.S. 198. The portion of the order respecting criteria for demotions and dismissals merely requires that the School District obey the law in taking steps against personnel. The ordered recruitment program for minority personnel is in substance the recruitment program contained in the School District's own desegregation plan as submitted to the court. Although the Dist-

rict's proposal failed to state its recruitment goals, Denver's superintendent of schools testified at trial that the District's affirmative action program would aim at achieving a racial-ethnic composition among professional staff that approximates the composition of the students in the District. We believe that the court's faculty and staff desegregation orders were proper and we affirm.

The judgment of the district court is affirmed in part and reversed in part.

Remanded.

APPENDIX A:
Summary of the Desegregation Plan Submitted by School District No.1

The School District's "Plan for Expanding Educational Opportunities in the Denver Public Schools" provides for the integration of professional staff to reflect, in each school, the racial-ethnic composition of the district's total teaching staff. Both new and veteran teachers would be specially trained in multi-ethnic techniques. The District would continue its recruitment of minority teachers. The District's plan provides for limited integration of students by means of reassignment and changes in the uses of school buildings. One junior high school and eleven elementary schools, most of them located in the central or core city area of Denver, would be closed.[25] All mobile classrooms in the

25. The District's proposal would close the following elementary schools: Westwood, Sherman, Boulevard, Crofton, Ebert, Moore, Stevens, College View, Emerson, Ellsworth, and Elyria. All of these but Westwood, College View, Stevens, Ells-

District would be closed, and the older portions of three elementary schools in the core city would be razed or closed. Students affected by these closures would be assigned to other schools. In addition, some students now attending Hallett and Stedman Elementary Schools would be assigned elsewhere. The District's plan provides for "concentrated efforts" to encourage Voluntary Open Enrollment for junior and senior high school students. Pursuant to this program minority students already attending predominantly minority schools are guaranteed enrollment in a predominantly Anglo school; conversely Anglo students at predominantly Anglo schools can transfer to a minority school. The plan also calls for establishment of a Career Education Center, which is to be a high school open to all of the city's high school students on a voluntary basis.

The District projected that its

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worth, and Elyria serve children from the core city area. Morey Junior High which serves the core city, would also be closed.

proposed school closures and student reassignments would result in 54 elementary schools having Anglo enrollments of between 25% and 75%; 27 elementary schools would remain "predominantly Anglo" or "predominantly minority," that is, outside the 25%-75% Anglo guideline.[26] Thirteen of the District's seventeen junior high schools and six of the District's nine high schools would, under the District's plan, receive Anglo enrollments of between 25% and 75%.[27]

The final important feature of the District's plan relates to the needs of elementary and junior high students who remain, under the plan, at "predominantly

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26. Based on enrollment figures for the 1973-74 school year 53 of the District's elementary schools currently fall within the District's guidelines, and 39 elementary schools are "predominantly Anglo" or "predominantly minority" as those terms are defined in the District's plan.

27. Currently twelve junior high schools and five high schools fall within the District's guidelines. The remainder are either "predominantly Anglo" or "predominantly minority" as those terms are

minority" and "predominantly Anglo" schools. The District proposes establishment of Educational Enrichment Centers (EECs), which students from these schools will attend half-day for a three-week term each semester. EECs would provide individualized instruction in an integrated setting. The District also proposes a system-wide multi-cultural education program, which would involve a variety of integrated activities.

The district court rejected this plan on the ground that it was "unconstitutional and equitably defective." The plan's continued maintenance of a substantial number of predominantly minority schools, the court held, would constitute a violation of the fourteenth amendment. Minority students' part-time attendance at Educational Enrichment Centers for three weeks each semester would fall short of integration regardless of educational advantages claimed for the Centers. The court found that closure of many inner-city schools would detrimentally affect inner-city neighborhoods and would unfairly burden residents: "The

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defined by the District.

closing of the schools would inevitably result in changing the character of areas which are favorably located for achieving integrated neighborhoods and integrated schools." 380 F.Supp. at 683.

APPENDIX B:
Summary of Desegregation Plans Submitted by Plaintiffs Keyes et al.

The plaintiffs' plans, both authored by Dr. Michael Stolee, aim for averages of between 40% and 70% Anglo enrollment for each elementary and junior high school in the District, and averages of between 50% and 80% Anglo enrollment for each senior high school.[28] Under Dr. Stolee's first plan, the twenty-two elementary schools whose enrollment, as of September 1973, fell within his guidelines would not be affected. Each of the remaining 70 elementary schools would be "paired" or "clustered" with other schools for purposes of student reassignments. These schools would retain their own neighborhood kindergartens. Thereafter students would attend their neigh-

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28. Dr. Stolee developed these guidelines from present District-wide averages. The elementary and junior high guidelines represent a 15% variance, on either side, from the present District average Anglo enrollment of roughly 55%. The senior high school guideline repre-

borhood schools for three years (either grades one-three or four-six) and would attend a receiving school for three years. Each school would receive all children from the paired schools in either grades one-three or four-six. In all cases, present school attendance zones would be used in the pairing and clustering of schools. Junior high school assignments would follow from the feeder relationships from elementary pairs and clusters. Thus certain children would attend neighborhood junior high schools, which would also receive pupils from satellite attendance areas defined by elementary pairs or clusters. The plan calls for desegregation of senior high schools by means of exchanging students between Jefferson and Manual and between Kennedy and West.

Dr. Stolee projected that his initial plan would result in by-school Anglo enrollment percentages ranging from 38.3% to 68.9% in elementary schools; from 53% to 64% in junior high schools; and from 50.8% to 78.5% in senior high

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sents a 15% variance, on either side, from the present 65% average.

schools. The plan would raise the District's transportation requirements from the current level of 15,000 students to between 24,000 and 27,000 students. Dr. Stolee projected that minority and Anglo students would proportionately share the impact of transportation on elementary, junior high and high school levels respectively.

Dr. Stolee's alternate proposal followed the court's request for further plans based primarily upon the restructuring of school attendance areas. By seeking to exhaust the potential of rezoning as a desegregation tool, the court believed it could minimize the need for transportation and maximize "walk-in" integration. Accordingly, Dr. Stolee's alternate plan provides for rezoning 32 elementary schools, six of which would, in addition, receive students from satellite attendance areas. Fifty other elementary schools would be organized into pairs or clusters, which would operate in the same manner as if the plaintiffs' initial plan. The six remaining elementary schools -- three of which lie in the central portion of the city -- would be

closed under the alternate plan. All of the city's junior high schools would be rezoned, and nine of these would receive students from satellite attendance areas. Likewise all of the city's high schools would be rezoned, and seven of them would receive pupils from satellite attendance areas. Dr. Stolee projected that his alternate plan would result in a range of by-school racial enrollment percentages roughly similar to those resulting from his initial plan.[29] The alternate plan would require busing of some 29,055 students.

The district court rejected the plaintiff's plans primarily because they would require excessive transportation of students. Although the plans would equitably share the impact of busing between Anglo and minority students, a substantial number of students would nevertheless be unnecessarily transported. "[A] movement of minority students to a non-integrated

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29. Projected Anglo enrollments range from 35.9% to 72.7% among elementary schools; from 39.9% to 82.6% among junior high schools; and from 57.8% to 72.3% among senior high schools.

Anglo school would oftentimes carry not only minority students but many Anglo students as well. The opposite would also be true." 380 F.Supp. at 681. The court also found the plaintiffs' plans "too tightly structured"; each component of the plaintiff's programs is so closely interrelated to other components that failure of one would result in chaos to the whole. Finally the court rejected plaintiffs' plans because they would effectively prohibit all students attending paired or clustered schools from remaining at their neighborhood schools through elementary grades; adjustments in this respect to special personal circumstances of students would be impossible.

Nos. 74-1349-50-51
WILFRED KEYES et al v. SCHOOL DISTRICT
NO. 1 et al

SETH, Circuit Judge, concurring specially;

As this case finds its way back to this court, there is really little that is unresolved. The trial court reached a similar conclusion when it said: "The Supreme Court's viewpoint based on the record before it is that the Denver school system is a dual system." I agree with the trial court's observation as it is apparent from the Court's opinion and should be followed. The trial court also said, and I agree again:

> Under the Court's definition it cannot be argued that within a unified school district such as that at bar there can exist conscious and knowing segregation in one area and innocent segregation in another. The conclusion is therefore inescapable that the Denver system is a dual system within the Supreme Court's definition.

It is necessary however to briefly consider some of the applications of the

Court's opinion to the facts expressly found by the trial court, in the original hearings, and undisturbed by the Supreme Court. This is necessary in view of the remedy imposed by the trial court.

The Supreme Court in its opinion related the Park Hill acts of the then School Board to the core area schools, and determined that the Park Hill intent was evidence of intent to segregate the core area schools which had previously taken place. The Court said:

> ...[A] finding of intentional segregation on its part in one portion of a school system is highly relevant to the issue of the board's intent with respect to other segregated schools in the system. This is merely an application of the well-settled evidentiary principle that "the prior doing of other similar acts, whether clearly a part of a scheme or not, is useful as reducing the possibility that the act in question was done with innocent intent." 2 J.Wigmore, Evidence 200 (3d ed. 1940).

The only problem here the trial court

had with the application of this doctrine was the sequence of events in that the only finding of any unconstitutional acts or of improper intent by the Board was as to the Park Hill schools in 1960-1965. The trial court expressly found that no such acts or improper intent existed at any prior time. Allegations as to such acts were fully litigated, and findings made as this was a significant part of the prior hearing and of plaintiffs' complaint. The Supreme Court in the above quotation directed the trial court that the time sequence in the doctrine be reversed, and the Park Hill acts be related back in time to show intent then or improper acts then. This the trial court did, and thus used the Park Hill acts and intent in 1965 to show acts and intent in 1950 to 1953, or earlier, when Manual was shown to be a minority school. The trial court so followed the mandate of the Supreme Court and should be affirmed, although all the time problems were not thereby resolved.

If the trial court had not done so, the Section III presumptions of the Su-

preme Court opinion would have arisen. These were presumptions of fact that the core area schools were unconstitutionally segregated by acts of the School Board. Thus the option followed by the trial court was preferable in view of its prior findings of fact as to the core area schools.

Of this intent matter, and the remedies, it must be observed that school boards come and go, and there is little if any continuity of policy on any subject as the old members leave and new ones are elected. The record here clearly demonstrates this. School policy cannot be a continuing one over a long period and should not be; this after all is the reason for elections. The trial court initially seems to have taken this into consideration.

The prima facie case of unconstitutional acts in the previous years as to the core area was also based on a view of the facts as to the number of minority students in the Park Hill school involved in the acts. This number, according to the original findings of the trial court, constituted about ten per cent of

the minority students then in the entire system. This was a serious matter as the trial court decided in the first proceeding, and we agreed, but I am unable to determine whether such a percentage is the "substantial portion of the district" as the measure was applied by the trial court, but this does not determine the outcome of the case so need not be resolved.

It is not possible to tell how the trial court related the presumption of reciprocal effect to the isolated geographical matter, but again the result was in accordance with the mandate. A presumption of some reciprocal effect in 1965 had to be made, and apparently was originally. It had to be made because it is obviously no more than the other side of the same coin. Virtually all of the record on remand, other than remedy matters, relates to Park Hill as a separate geographical area, but it never has been seriously contended that it was. This has never been more than a straw man from the outset, and, of course, on remand no one contended that it was a separate area for the purposes indicated. Thus

with the geographically separate area as a non-issue from the start of the case, the hearing on remand developed nothing new or additional as to the facts except the remedy. The facts were fully established and found by the court in the course of prior hearings and were left undisturbed. On remand the trial court apparently related the issues mentioned above, and the result was in accordance with the mandate.

Thus the mandate of the Supreme Court was carried out, and thus I concur in the affirmance by Judge Lewis, except as to the remedy.

As to this remedy, if the system is a dual system, there may be nothing to do except apply the computer solution. This is apparently the "root and branch" cure indicated as the necessary but drastic solution in the de jure dual system cases. However, where as here, the unconstitutional acts are clearly identifiable, are specific, and are limited in time and scope, it would appear that the remedy can be more effecitve if it is related to the specific wrongs rather than to what is right as well as to what

was wrong. Any remedy must zero in on the violation if it is to be effective and responsive. It was error, in my opinion, for the trial court to apply the mechanical or computer mix recommended by Dr. Finger.

As to bilingual education as a "remedy" for the hispano core area schools, I agree with Judge Lewis. If there is segregation there imposed by the Board, as the Supreme Court indicates there is, it must receive the same treatment as in the black schools. The parties to this suit who had undertaken to speak for the Hispano students in these schools have asked for the complete remedy of desegregation, have argued well for it, and if the other areas are to have such relief, these schools must have it also. The Supreme Court in its opinion ordering remand has directed that these students and the black students be considered together, and for this reason it must be done. The Supreme Court in this respect chose to rely upon the facts included in the report of the United States Commission on Civil Rights, cited in a footnote in its opinion. I agree with Judge Lewis

that bilingual education, apparently now required under Colorado law, is not a remedy for segregation.

I would remand for a complete reconsideration of the remedy.

Nos. 74-1349, 74-1350, 74-1351
WILFRED KEYES, et al. v. SCHOOL DISTRICT
NO. 1, et al.

BARRETT, Circuit Judge, specially concurring:

I concur in Chief Judge Lewis' opinion but wish to add the following thoughts:

When this case reached the Supreme Court following appeal from our Court, 445 F.2d 990 (10th Cir. 1971), both the Trial Court and this Court had found and held that there was no proof of deliberate racial segregation of schools in the District beyond the Park Hill area. Even though the Supreme Court, on appeal, stated that it did not reach the merits, it is fair to conclude, in my opinion, that the conscientious Trial Court, upon remand, properly interpreted the Supreme Court opinion reported in 413 U.S. 189 (1973) as drawing an inescapable conclusion that the Denver school system is a dual system. It would be difficult, if not impossible, to read the Supreme Court opinion otherwise, notwithstanding the directions that an evidentiary hearing be conducted, on remand, to determine whether the School Board may meet the

burden imposed: that its actions as to "segregated schools" in the single school system outside of the Park Hill area were not likewise motivated by a segregative intent. This was, as I see it, a burden impossible to meet. I agree with Judge Doyle's pertinent observations that "The Supreme Court re-examined the facts and approved the conclusion that conduct here [the Park Hill area] constituted de jure segregation" and "the Supreme Court regarded as error the requiring of plaintiffs in a school case such as the one at bar to offer proof that the segregation in each and every instance and in each and every school was the product of official action." I concur with the Trial Court's observation that the Supreme Court for the first time (in Keyes, et al.) pronounced de facto-de jure concepts.

Accordingly, on remand, there really was little unresolved by the Supreme Court. The Trial Court was instructed to undertake the time consuming and burdensome obligations imposed upon it to desegregate School District No. 1 "root and branch." Like so many catch-words

or appealing slogans, the objective -- while ideal and in keeping with the highest traditions of equality -- is in fact not to be "come by" or accomplished via the judicial route without a federal judiciary "up to its neck" in operating, managing and directing state school systems. Perhaps there is no other solution, given the immediacy suggested by the Supreme Court, with its particular "root and branch" mandated cure.

In our efforts to attain objectives which are pure, good and necessary of achievement in our society, we seem, I believe, to have become blinded to the fact that many cures must -- for the most practical of reasons (financial ability to effectuate them in particular) -- take more time and patience than that in which the instant case is now posited.

Of recent vintage, the Supreme Court, in matters involving state criminal statutes, has dictated the application of principles of equity, comity, and federalism in refusing to entertain federal court actions challenging the constitutionality of those statutes when no state prosecution is threatened.

Younger v. Harris, 401 U.S. 37 (1971); Samuels v. Mackell, 401 U.S. 66 (1971); Steffel v. Thompson, 415 U.S. 452 (1974). And more recently the Supreme Court took a further step in a "hands off" approach in holding that if a state criminal charge is filed at any time after the commencement of a federal action challenging the constitutionality (on federal standards) of the state statute under which the charge is brought, the federal action must be dismissed unless the federal action has proceeded to a determination on the merits. Hicks, District Attorney of Orange County, et al. v. Miranda, DBA Walnut Properties, et al., ___U.S. ___ (Slip Opinion, No. 74-156, June 24, 1975).

In San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973) the Supreme Court observed that although education is one of the most important services performed by the state, it is not within the limited category of rights recognized by the Supreme Court as guaranteed by the Constitution. This Court observed similarly in Freeman v. Flake, 448 F.2d 258 (10th Cir. 1971), cert denied 405 U.S. 1032 (1972):

> The states have a compelling interest in the education of their children. The states, acting through their school authorities and their courts, should determine what, if any, hair regulation is necessary to the management of the schools.
> 448 F.2d 258 at 261.

That there exists "some inequality" in a school system is not sufficient ground to strike down a whole system. McGowan v. Maryland, 366 U.S. 420 (1961). No person of good will toward his fellow man can logically argue that the thrust of Brown v. Board of Education, 347 U.S. 483 (1954) is not long overdue: That children of all races, cultures, color, environmental and ethnical backgrounds and origins are entitled in these United States to equal public educational opportunities and benefits.

There are no easy or quick solutions to many problems confronting our country. It is a serious mistake, in my judgment, to interject the federal

judiciary in the operation, composition, management and control of the state school systems. It was never intended that such would be the case. The federal judiciary is not designed to operate and manage school systems. The facts and circumstances are so variable and complex that discretion must be one of clear choice, and it is an injustice to our district courts to require that they monitor the system forever, together with their burdensome trial dockets, and be answerable to courts of appeal "around the clock."

The remedies ordered by the Trial Court may be wholly correct and justified. The fact remains, however, that the School Board and administrative officials of the District are no longer managing, operating or controlling the system. The result from my point of view is at direct odds with the proper balance of Federal-State relations. As heretofore noted, it imposes an onerous and overwhelming task on a federal judiciary which is already "smothered" with trmendous dockets involving issues

designed for true judicial treatment, adjudicative rather than administrative in nature. No one would contend that the federal judiciary is the body to allocate available state funds to the integrative objectives of the school systems in such a manner that it will decide the priority and amount of remaining funds for other necessary and proper state governmental functions. The Tenth Amendment did reserve to the people of the various sovereign states those powers not otherwise expressly delegated to the Federal Government.

Ours is an ever increasing society of emergency priorities, which many believe can be cured by the expenditure of public funds. It seems clear to me that the time has arrived when the pressure of such emergencies has finally brought us to this realization: Ours is now a nation bogged down in debt, largely as a result of so many mandated "cures" which today cannot be adequately financed from available revenues.

On remand, I would include, if in anywise possible, the diminishment or

complete abolishment of the extremely expensive and sensitive use of the "busing tool" which, if accomplished completely or in progressive stages (perhaps in conjunction with long-term upgrading of both the staffs and facilities at various existing schools, together with projections of new school buildings and particular study of re-establishment of boundary lines in order to best effectuate equality predicated on the most adequate present estimates of population growth and movement trends within the District) would, in effect, "free" a great deal of operating money for much needed upgrading of teaching materials, facilities and, in a budgetary sense, provide the Board with some additional leeway to meet increased salary demands of school personnel.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. C-1499

WILFRED KEYES, et al.,

Plaintiffs,

v.

SCHOOL DISTRICT NO. 1,
Denver, Colorado, et al.,

Defendants,

CONGRESS OF HISPANIC EDUCATORS,
et al.,

MONTBELLO CITIZENS' COMMITTEE, INC.,

MOORE SCHOOL COMMUNITY ASSOCIATION AND
MOORE SCHOOL LAY ADVISORY COMMITTEE,

UNITED PARENTS OF NORTHEAST DENVER, a
non-profit corporation, et al.,

CITIZENS ASSOCIATION FOR NEIGHBORHOOD
SCHOOLS, an unincorporated association,

CONCERNED CITIZENS FOR QUALITY EDUCATION,

Intevenors.

FINAL JUDGMENT AND DECREE

THIS CAUSE, having been tried before the Court on its merits upon the issues remanded by the Supreme Court, and the Court having made and filed its Memorandum Opinion of December 11, 1973, wherein it was determined that the acts and policies of intentional segregation by the defendants were not isolated or remote from the rest of the School District, that the entire school system was an illegal .ual school system, and that a system-wide plan of desegregation "root and branch" was therefore required under the mandate of the Supreme Court, and

The Court, having first considered various desegregation plans submitted by the parties, and having found them to be inadequate, and the defendant Board having failed to come forward with adequate alternate plans despite repeated requests by the Court, and, based upon the inadequacy of the Board's plans the Court having directed its consultant, Dr. John Finger, to devise a plan for consideration, and

The Court, having considered Dr. Finger's plan, as well as alternate plans submitted by the parties, and having considered parties' objections to all plans, and having made and filed its Memorandum Opinion and Order dated April 8, 1974, which constitutes the Court's findings of fact and conclusions of law,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

1. The defendants, their agents, officers, employees and successors and all those in active concert and participation with them, be and they are permanently enjoined from discriminating on the basis of race or color in the operation of the school system. As set out more particularly in the body of the decree, they shall take affirmative action to disestablish all school segregation and to eliminate the effects of the dual school system;

2. The defendants, their agents, officers, employees and successors and all those in active concert and participation with them, shall implement and place into effect beginning with the

school year 1974-75 the student and faculty reassignment provisions of the desegregation plan authored by Dr. John Finger, dated April 5, 1974, the maps illustrating the Plan, and the additions and corrections thereto, hereinafter referred to as the "Finger Plan," and attached hereto and incorporated herein by reference, and the modifications thereto set forth in the Memorandum Opinion and Order dated April 8, 1974, as summarized below;

3. The Finger Plan shall be modified as follows:

A. All elections or selections of student officers and student leadership positions in the junior high and high schools shall be deferred from the Spring 1974 semester to the Fall 1974 semester. Those students entering grade 12 in September 1974 who are assigned to a high school other than the one they attended during the Spring semester 1974 shall have the option of receiving their high school diplomas from either the school from which they have been re-assigned in September 1974 or the school from which

they have been re-assigned, providing all other requirements for graduation have been met.

B. Defendants are directed to consult with Dr. Finger in the process of moving the "grid lines" to the nearest street, dividing grids and satellites between schools when required, and also determining the boundaries between Byers and Baker, which shall be retained as separate schools. The area south of the Lowry Air Force Base described in the Finger Plan shall be assigned to Baker.

C. The Anglo enrollment at Morey Junior High shall be not less than 50%. This may be accomplished by re-assignment of minority pupils to Hill or other junior high schools within the guidelines established for such schools.

D. Cole Junior High School shall have an Anglo enrollment of not less than 60%. This may be accomplished by reducing the minority enrollment at Cole or by re-assignment of a portion of the Gove satellite to Cole.

E. Smiley Junior High may remain outside of the secondary school guidelines

pending completion of new Gove Jr. High in September 1975.

F. The defendants shall have the option of establishing an alternate program of vocational courses either at Manual or at other premises to meet specific needs for such courses.

G. Extra transportation for children missing their regular bus need not be provided.

H. Transportation at District expense shall be furnished parents for PTA meetings or other school-sponsored activities when requested by the parents through the sponsoring organization.

I. Kindergarten children will not be reassigned hereunder, but will attend their "neighborhood" school.

J. It is the Court's intention that all grade-level children in the paired elementary schools shall participate equally and equitably in the pairing program. Defendants are directed to provide a means of student selection which will achieve such participation while implementing the proviso (pp. 37-38, Memorandum Opinion of April 8, 1974) for

transporting "one-half the lowest number."

K. The District need not provide the junior high school transportation suggested by the Finger Plan (p. 16) with regard to students living within a mile of one school who are reassigned to another school more than one-and-a-half but less than two miles from their residence.

L. Certain children residing within "satellite" areas defined on the Finger Plan maps may, at their option, remain in their currently-assigned school (i.e., nearest "neighborhood" school), as follows: Black or Chicano children living in predominately-Anglo satellite areas, and Anglo children living in predominately-minority satellite areas. Such options should be exercised through written notification to the District by July 15, 1974, and defendants shall keep records of same and report to the Court the results thereof by August 15, 1974.

4. The Finger Plan as adopted gives the defendants certain options and leaves certain of the administrative detail to the good faith

exercise of the defendant's discretion.

The defendants shall promptly consider said alternatives and report to the Court as to their decisions in this regard; further, the defendants shall forthwith consider and advise the Court as to such administrative and educational details, e.g., selection of students, determination as to whether participation in elementary pairing is to be by alternate days, weeks, or other periods, organization of the school day, adjustment of attendance zones to accommodate building capacities, changed circumstances or unanticipated results. The defendants shall not alter or deviate from the Finger Plan without the prior approval and permission of the Court. If defendants are uncertain concerning the meaning or intent of the plan, they should apply to the Court for interpretation and clarification. It is not intended that the school authorities be placed in a "straight jacket" in the administration of the plan, but it is essential that the Court be informed of any proposed departure

from the sanctioned program. The Court is committed to the principles of the plan, but is not inflexible concerning the details;

5. The duty imposed by the law and by this Order is the desegregation of schools and the maintenance of that condition. The defendants are encouraged to use their full "know-how" and resources to attain the described results, and thus to achieve the constitutional end by any legal means at their disposal;

6. Except as otherwise provided herein, the defendants have a continuing obligation to operate and maintain desegregated schools, including present, or proposed new schools, and a duty to control the assignment of pupils so as to prevent any school from becoming racially indentifiable as a segregated school;

7. The determination of whether any program of Voluntary Open Enrollment shall continue shall await final decision until such time as the details under the Finger Plan are fully developed. At that time the parties are invited to submit

proposals as to Voluntary Open Enrollment, the schools or students eligible for participation, and other details. Provided, however, that the present restraints upon participation by minority students, whereby a Black or Chicano child is denied admission to a predominately Anglo school because the Black or Chicano enrollment in that school (but not the total minority enrollment) exceeds the district-wide average, shall be discontinued;

8. That the defendants retain their power and duty to make assignments of pupils for administrative reasons, with or without requests from parents. Whenever feasible, such transfers shall be made to improve integration at the transferee school. If transfers are sought on grounds of "hardship," race will not be a valid basis upon which to demonstrate "hardship." The defendants shall keep records of all transfers, the reasons therefor, the race of ethnicity of the student, and the transferee and the transferor school.

9. No student shall be segregated or discriminated against on account of race or color in any service, facility, activity, or program (including extra-curricular activities) that may be conducted or sponsored by the school in which he is enrolled. A student assigned to a school for the first time under this Order may not be subject to any disqualification or waiting period for participation in activities and program, including athletics, which might otherwise apply because he is a transfer or newly assigned student. All school use or school-sponsored use of athletic fields, meeting rooms, and all other school related services, facilities, activities, and programs such as commencement exercises and parent-teacher meetings which are open to persons other than enrolled students, shall be open to all persons without regard to race or color. All special programs conducted by the defendants shall be conducted without regard to race or color (violations of this nature have not occured);

10. The defendants shall to the extent feasible maintain its present programs of collateral services such as the hot breakfast program, free lunch, tutorial programs, health services, remedial and compensatory education programs. Defendants shall report to the Court as to the impact, if any, of the implementation of this Decree upon the financing for, or availability of, any such programs;

11. Transportation shall be provided at District expense in accordance with the provisions and criteria set forth in the Finger Plan (see, e.g., pp. 2, 16, 21 and 24, Finger Plan). Defendants shall promptly file with the Court an effective and efficient transportation plan in sufficient detail to enable evaluation by transportation specialists designated by the Court as to the adequate provision of transportation services.

Defendants shall forthwith obtain by purchase or other arrangement all necessary transportation equipment for

full implementation of the plan for the opening of the 1974-75 school year.

12. Defendants shall implement their proposals for the training of school personnel, and the orientation of pupils and parents, in substantially the form proposed in Defendant's Exhibit ZB-III, attached to the Memorandum Decision and Order dated April 8, 1974, with the dates for implementation adjusted to reflect commencement on or about April 15, 1974. All training for school personnel, whether in the central administration, the administrators, faculty, staff, or other supportive services shall be on a mandatory basis.

13. A Monitoring Commission composed of outstanding members of the community shall be appointed by the Court; the parties are invited to promptly submit the names of nominees. The Monitoring Commission shall initially serve until June 1, 1975, and shall be furnished with secretarial services by the District. Should it determine that a paid executive director and/or staff

would be necessary to its functions, it shall make recommendations to the Court as to nominees and petition the Court concerning the provision of same.

Defendants are directed to cooperate with the Monitoring Commission and to render it assistance and provide information as the Commission shall request.

14. The Monitoring Commission shall perform the following functions:

A. Coordination of the efforts of community agencies and interested persons in implementation of the Plan;

B. Community education as to the Court's findings and conclusions in the case, and the constitutional requirement of desegregation.

C. Community education as to the requirements of the Plan as to the provision of services and facilities;

D. Receiving and considering the

comments, criticisms and suggestions of the community regarding execution of the Plan, assisting the community in working out problems with the school administration, and reporting to the Court as to the nature and resolution of such problems;

E. Reporting periodically to the Court and the parties as to the execution of the Plan, and providing ongoing monitoring of such implementation.

15. The defendants shall further develop a bilingual-bicultural educational program in accordance with the model presented by Dr. Jose Cardenas or a plan substantially and materially similar thereto and incorporating to the extent feasible the proposals set forth in the Addendum to the Cardenas Plan. Such program shall consider and treat the matters of educational philosophy, policies, scope and sequence, curriculum, staffing, co-curricular activities,

student personnel services, non-instructional needs, community involvement and evaluation.

The defendants shall engage the services of a qualified consultant or consultants to assist in the development and implementation of such program.

The program shall be implemented at Del Pueblo elementary school with provisions for voluntary enrollment by Anglo and Black students in September, 1974; the program shall be implemented on a pilot basis at Cheltenham, Garden Place and Swansea elementary schools and at Baker Junior High School and West High School. It is anticipated that as these programs are developed and proved, they will be placed in other schools where needed and/or desired.

The defendants shall report bi-monthly as to their progress in the development of the program, the components thereof and the staffing therefor, beginning on May 1, 1974.

16. The defendants are enjoined from locating or constructing new

schools or additions or expansions of existing schools in such manner as to conform to racial residential patterns or to encourage or support the growth of racial segregation in residential patterns, and are enjoined to plan, design, locate and construct any and all new schools or additions or expansions to existing schools in such manner as to affirmatively promote and provide for a desegregated student body in each school in the school system. All plans for such new schools or additions or expansions to existing schools and the abandonment of existing facilities shall be submitted by defendants to the Court, with notification of such submission to counsel for plaintiffs. Such submission shall include projected enrollment data by race or ethnicity so as to show the impact of new facilities upon the desegregation process. Any parties wishing to object to the proposal shall file written objections with the Court and upon the parties within thirty days.

17. The defendants are directed to file with the Court periodic and specific reports detailing the status of their compliance with the provisions of this Decree. Such reports shall commence on May 1, 1974, and be filed monthly thereafter, through September 1974. Such reports will include a description of the status of the training and orientation programs set forth in defendants' Exhibit ZB-III, the status of the programs for community education and explanation of the plan, the decisions reached as to the various alternatives open under the Finger Plan regarding student assignment, adjustment of attendance boundaries and the projected effects thereof, development, organization and coordination of teaching schedules and programs and curriculum with regard to such matters as the paired elementary schools and the East-Manual complex, joint organization of PTSA's, the mechanics of student selection and the method of exchange between paired schools, the placement and sharing of spe-

cial equipment between paired schools, the adjustment of satellite zones and their receiving schools to continue existing assignments and the projected effects thereof, the assignment procedures selected for Alcott-Smedley, Fairmont-Lincoln and Remington-Berkeley, the establishment of the attendance zones for Byers and Baker Junior High Schools, faculty and staff reassignment, the proposed adjustments to the attendance zones of Smiley, Morey, Gove, Cole and Hill and the projected effects thereof, upon the opening of new Gove, the development of the transportation plans required for implementation.

18. In addition to the foregoing monthly reports regarding the status of preparation and implementation, defendants shall, as soon as practicable after the opening of schools in September, 1974, and in any event, no later than October 15, 1974, and again within 30 days of the beginning of the second semester in 1975, report to the Court on the following matters:

(1) The number and percentage of students by grade, race or ethnicity in each school and the district-wide totals for elementary, junior and senior high school.

(2) The number and percentage of teachers by grade (or subject taught), race or ethnicity in each school, and the district-wide totals for elementary, junior and senior high schools. This requirement can be satisfied by submitting the principal's reports to plaintiffs' counsel.

(3) The number of students by race or ethnicity in each paired classroom in the paired elementary schools.

(4) The number of probationary teachers in each school, and their race or ethnicity.

(5) The number of tenured teachers

in each school, and their race or ethnicity.

(6) The number of full-time substitute teachers in each school and their race or ethnicity.

(7) The number of aides in each school, and their race or ethnicity.

(8) State the number of students who were suspended, and the number expelled, by school, by grade, by race or ethnicity, for the prior semester, as shown on the cumulative records of pupils involved.

(9) State the number of administrative and hardship transfers requested, by school, and, as to each such request, state the race or ethnicity of the student, the transferor and transferee school, the reasons therefor, and the disposition of the request.

(10) Describe the actions taken to implement the bilingual-bicultural program since the last report, along with the numbers of Chicano, Black and Anglo children, by school and by grade, and teachers and aides and other community personnel who are participating in the program.

19. Desegregation of faculty and other staff; increased hiring of minority teachers.

The School Board shall announce and implement the following policies:

A. Effective not later than the beginning of the 1974-75 school year, the principals, teachers, teacher-aides and other staff who work directly with children at a school shall be so assigned that in no case will the racial or ethnic composition of a staff indicate that a school is intended for minority students or Anglo students. The District shall assign the staff described above so that the ratio of

minority to Anglo teachers and other staff in each school shall be not less than 50% of the ratio of such teachers and other staff to the teachers and other staff, respectively, in the entire school system. Because of the present small number of Chicano teachers in the system, complete achievement of the required ratios as to Chicano teachers is not required immediately, but should be achieved as soon as possible.

The school district shall, to the extent necessary to carry out this desegregation plan, direct members of its staff as a condition of continued employment to accept new assignments.

B. Staff members who work directly with children, and professional staff who work on the administrative level will be hired, assigned, promoted, paid, demoted, dismissed, and otherwise treated without regard to race, color, or national origin.

C. If there is to be a reduction in the number of principals, teachers,

teacher-aides, or other professional staff employed by the School District which will result in a dismissal or demotion of any such staff members, the staff member to be dismissed or demoted must be selected on the basis of objective and reasonable non-discriminatory standards from among all the staff of the School District. In addition, if there is any such dismissal or demotion, no staff vacancy may be filled through recruitment of a person of a race, color, or national origin different from that of the individual dismised or demoted, until each displaced staff member who is qualified has had an opportunity to fill the vacancy and has failed to accept an offer to do so.

Prior to such a reduction, the school board will develop or require the development of non-racial objective criteria to be used in selecting the staff member who is to be dismissed or demoted. These criteria shall be available for public inspection and shall be retained by the School District. The School

District also shall record and preserve the evaluation of staff members under the criteria. Such evaluation shall be made available upon request to the dismissed or demoted employee.

"Demotion" as used above includes any reassignment (1) under which the staff member receives less pay or has less responsibility than under the assignment he held previously; (2) which requires a lesser degree of skill than did the assignment he held previously; or (3) under which the staff member is asked to teach a subject or grade other than one for which he is certified or for which he has had substantial experience within a reasonably current period. In general, and depending upon the subject matter involved, five years is such a reasonable period.

D. The defendants are directed to implement forthwith an affirmative action plan for the hiring of minority teachers, staff and administrators on a priority basis with the goal of attaining a ratio of Chicano and Black person-

nel within the District which reflects more truly the ratio of Chicano and Black students to the total student population at the elementary, junior high, senior high levels and district-wide. The affirmative action plan shall indicate that a top priority has been placed on the employment of Chicanos and Blacks and shall contain yearly timetables together with a reasonable target date for the attainment of the above-mentioned goal. The District shall utilize all reasonable means available to it to ensure that the District's needs are made known to, and that contact is made with, minority graduates. The defendants need not lower their employment standards but must justify any failure to make substantial progress toward the goal; in the event that such progress is not forthcoming, the Court may establish more precise timetables and criteria.

The defendants shall submit semi-annual reports to the Court outlining their efforts and progress towards

attaining the goals in the affirmative action plan. The defendants shall commence filing these reports on September 1, 1974.

20. It shall be the duty of defendants, except as hereinbefore provided, to assign each student in accordance with the Finger Plan. The defendants shall take steps to prevent the frustration, hinderance or avoidance of this Decree, particularly with regard to spurious transfers and falsification of residence to avoid reassignment. If it should appear that a transfer or purported resident address is questionable, the defendants shall cause the matter to be investigated in person for the purpose of verifying and confirming the bona fides of the matter, and shall keep records of each such investigation and the results thereof.

21. It is further provided that this order is binding upon the Defendant Superintendant of Schools, the Defendant School Board, its members, agents servants, employees, present and future,

and upon those persons in active concert or participation with them who receive actual notice of this order by personal service or otherwise. Rule 65(d), Federal Rules of Civil Procedure. Any attempt to hinder, harass, intimidate, or interfere with the School Board, its members, agents, servants, or employees in execution of this order shall be reported to the Department of Justice through the United States Attorney for the District of Colorado, Federal Courthouse Building, Denver, Colorado 80202, telephone 837-4184, for appropriate proceedings to safeguard federally-protected rights and activities and to prevent obstruction of this Order of the Court. See 18. U.S.C. § 245; 18 U.S.C. § 401; 18 U.S.C. § 1509; and 42 U.S.C. § 2000h.

22. The fees and expenses of Dr. John Finger are taxes as costs herein against the defendants, since the services of Dr. Finger were necessary to the development of an adequate and acceptable plan; such fees and expenses shall be

paid forthwith as statements therefor are received by the defendants.

23. Plaintiffs' motion for leave to amend the prayer of their Complaint to include a request for award of attorneys' fees since the inception of this action is hereby granted. Costs shall be awarded to plaintiffs. Consideration and determination of the taxation of costs and the plaintiffs' request for an award of attorneys' fees is hereby temporarily deferred. Plaintiffs' counsel are directed to submit their bill of costs to date to the Clerk of the Court on or before June 1, 1974.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that this shall constitute a Final Judgment in the case and shall be entered as such. This Final Judgment and Decree shall supersede any prior orders or decrees herein. This Court shall retain jurisdiction for the purpose of supervising implementation and modifying its provisions as may be necessary from time to time, until such time

as the defendants have demonstrated the disestablishment of their dual school system and the maintenance of a unitary, desegregated system on a continuing basis. In any event, there being no further substantive matter to decide, there is no just cause for delay and the entire matter can now be appealed.

Date at Denver, Colorado, this 17th day of April, 1974.

WILFRED KEYES et al.,

Plaintiffs,

versus

SCHOOL DISTRICT NO. 1, DENVER, COLORADO et al., Defendants,

Congress of Hispanic Educators et al.,

Intervenors.

Civil Action No. C-1499

UNITED STATES DISTRICT COURT,
D. COLORADO.

April 8, 1974.
Order April 24, 1974.

MEMORANDUM OPINION AND ORDER

WILLIAM E. DOYLE, Circuit Judge.

This is one more (and hopefully the final) episode in the Denver school desegregation case. The object of the present trial has been determination of a just, equitable and feasible plan for the desegregation of the schools in accordance with the mandate of the Supreme Court requiring elimination of invidious discrimination and the deprivation of equal educational opportunity.

The scope and magnitude of the problem is evidenced by the numbers and ethnic origins of students as of September 28, 1973. In the elementary schools there were 46,060 students, including 17.6% black, 27% Spanish surnamed and

54.1% Anglo. The total enrollment in the junior high schools on the same date was 21,018, including 18.5% black, 24% Spanish surnamed and 56.6% white. The senior high schools totaled 20,542. The percentage of black students was 17.3%, that of Spanish surnamed students was 17.8% and that of Anglo students was 63.8%.

Segregation exists in minority schools on the one hand and non-integration of Anglo schools on the other throughout the District. There tends to be extreme concentrations of minority students at the north end of the District and equally high concentrations of white students in the middle and progressively to the south part of the District. In general, Hispano (Chicano) families live on the west side of the District. Here again, there are highly concentrated schools, although many of the schools even though segregated are somewhat less concentrated than the black schools. Some of these Chicano schools lend themselves to integration without transportation.

It is to be noted that the School

District and the city are coterminous and have an area of 100 square miles.

The cause has been in litigation since the action was filed in June 1969. Following a preliminary trial, a partial desegregation plan was adopted in the northeastern sector of Denver. This was a plan which had been first adopted by the then School Board. Soon after adoption of the plan by the Board, there was a School Board election which resulted in two of the members of the School Board who had voted in favor of the plan being defeated. Immediately the newly elected members brought about the repudiation of the Resolutions which would have produced partial desegregation. This triggered the filing (in June 1969) of the present suit. A hearing on preliminary injunction was held and various subsequent trials and hearings were conducted on the merits and on the adoption of an appropriate plan. At the same time, there were circuit court appeals,[1] and the

1. 445 F.2d 990 (10th Cir. 1971.) An order entered remanding the case to the district court was not published.

cause has been before the Supreme Court of the United States for partial as well as full-scale review. See Keyes v. School District No. 1, Denver, Colorado, 413 U.S. 189, 93 S.Ct. 2686, 37, L.Ed.2d 548 (1973). The published decisions showing some of the background leading to the present controversy are set forth below.[2]

Writing for the majority of the Supreme Court Mr. Justice Brennan noticed numerous evidences of pervasive de jure segregation and reversed the cause for the purpose of a determination by this court as to whether the de jure segrega-

2. 303 F.Supp.279 (D.C.Colo.1969) (the preliminary injunction); 303 F.Supp.289 (D.C.Colo.1969) (supplemental findings in the preliminary injunction matters); 313 S.Supp.61 (D.C. Colo.1970) (judgment entered for plaintiffs on the first claim and in favor of defendants on all but one count of the second claim; this was tried on the merits); 313 F.Supp.90 (D.C.Colo. 1970) (opinion issued on the remedy on May 21, 1970).

tion which had been found in the northeastern quadrant of Denver was independent, isolated and unrelated to the segregation conditions present in the rest of the School District.[3]

Following the Supreme Court decision which was rendered in June 1973, rehearing denied, 414 U.S. 883, 94 S.Ct.27, 38 L.Ed.2d 131 (1973), and the remand, a further evidentiary hearing was held in accordance with the remand.

In its December 1973 decision, using the guidelines which had been furnished by the Supreme Court decision, this court ruled that the Park Hill segregation was not an isolated and independent condition and consequently that it was to be concluded (from the Supreme Court mandate) that the entire system was subject to the identical condition present in Park Hill, i.e., de jure segregation, and that this (in accordance with the Supreme

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3. This court had ordered desegregation but had done so on the basis that the separate minority schools offered unequal educational opportunities. The Supreme Court was dissatisfied with this legal approach.

Court's decision) required that there be desegregation "root and branch." Following this decision, a further pretrial hearing occurred on December 17, 1973. Each of the parties was given approximately 30 days from the date of the December 17, 1973, hearing to submit a plan for the desegregation of the Denver schools. Subsequently, such plans were duly filed, as were objections by each of the parties. At a further trial of two weeks' duration from February 19, 1974, evidence was presented with respect to tendered plans.

The principal parties offered evidence in explanation and support of their tendered plans and offered in addition evidence criticizing the plan of the adverse party. Various intervenors representing virtually all possible viewpoints in the community presented testimony and exhibits as to their particular problems arising from possible adoption of one or the other of the plans.

THE SCHOOL DISTRICT'S PROPOSED PLAN

The School District's plan which was entitled "A Plan for Expanding Education-

al Opportunity in the Denver Public Schools" has four sections. Section I deals with integration of the professional staff through reassignment and retraining; II with integration of the student body and changes in the use of facilities; III with integration of the student body through new programs; and IV with integration through programs, activities and related improvements.

The percentage guides for desegregation adopted by the Board were a minimum of 25% Anglo in each school and a maximum of 75%. Applying those figures it said that there existed a total of 53 elementary schools within the range and thus by this standard integrated.

There were (said the plan) 17 schools which had less than 25% minority students and a total of 22 schools which had a predominantly majority percentage of Anglos, that is to say, in excess of their 75% maximum.

The plan sought to close eleven schools and transfer the students attending these schools to other schools for the avowed purpose of improving either integration or educational opportunity.

In addition to the eleven elementary schools which were recommended to be closed, the Board proposed to close one junior high school and older sections of two elementary schools. As a result of all proposed closings there resulted a transfer of 4165 students to other facilities.

As a result of the School District's proposed elementary school closings and the reassignments, there were fifty-four schools (instead of the former fifty-three) with an Anglo enrollment of twenty-five to seventy-five percent. There were thirteen schools not touched which remained predominantly minority in that their Anglo enrollment was less than twenty-five percent (and in most instances substantially less).[4] Fourteen schools

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4. These minority schools and their projected Anglo composition are listed as follows:

SCHOOL	ANGLO %
Bryant-Webster	19.1%
Columbine	1.0%
Del Pueblo	11.6%
Fairview	8.8%
Garden Place	15.2%
Gilpin	1.5%
Greenlee	10.2%
Harrington	3.3%
Mitchell	2.9%

continued to have concentrated majority or Anglo percentages.[5]

Thus the plan made no effort whatever to desegregate or to integrate the above schools except for the three week, half-day sessions each semester at the enrichment center.

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4. continued

SCHOOL	ANGLO %
Smedley	14.2%
Smith	1.9%
Whittier	1.4%
Wyatt	3.1%

5. There remained fourteen schools with a predominantly majority percentage. These were:

SCHOOL	ANGLO %
Ash Grove	90.9%
Berkeley	80.7%
Bradley	93.2%
Bromwell	91.2%
Dennison	83.8%
Holm	91.1%
Kaiser	94.0%
McMeen	88.0%
Pitts	95.7%
Sabin	80.2%
Samuels	93.8%
Slavens	89.3%
Thatcher	76.7%
Traylor	92.8%

As noted, the School District made some effort to integrate several less highly concentrated schools by the closings in the central part of the city.

Following is the School Board's summary analysis of school closings and resulting enrollment figures:

WESTWOOD

Westwood's 603 pupils, 35.3% of which were minority, would be transferred to Force, Godsman, Goldrick and Schenck. The Anglo percentage at Force was reduced from 72.3% to 63.2%; at Godsman, from 73.2% to 62.6%; at Goldrick,, 75.0% to 68.9%; at Schenck, from 64.4% to 58.9%. Thus, at best the closing of Westwood and the transfer of students brought about a slight reduction of the Anglo percentage in these schools.[6]

SHERMAN

Sherman School, with an Anglo percentage of 61.1% was proposed to be closed and its 208 students were to be transferred to Fairmont which had an enrollment of 647. As a result of this, Fairmont's percentage of Anglo students would have been raised from 15.3% to 26.4%.[7]

Footnotes 6. and 7. follow on next page.

PAGES BOUND VERTICALLY

6. The School Board's columnar analysis is as follows:

SCHOOL	PRESENT TOTAL ENROLLMENT	PROJECTED TOTAL ENROLLMENT	PRESENT ANGLO %	PROJECTED ANGLO %
Westwood (to be closed)	603	0	35.3%	0
Force	627	827	72.3%	63.2%
Godsman	387	537	73.2%	62.6%
Goldrick	512	808	75.0%	68.9%
Schenck	551	679	64.4%	58.9%

7.

Sherman (to be closed)	208	0	61.1%	0
Fairmont	647	855	15.3%	26.4%

BOULEVARD

The Board also proposed to close Boulevard School which had 27.0% Anglo enrollment and 259 total students. The proposal was to transfer the Boulevard students to Ashland with the result of decreasing the Anglo percentage in Ashland from 32.1% to 30.4%.[8]

CROFTON

Crofton Elementary School was proposed to be closed and its 285 minority students of a total of 287 were to be reassigned to Bradley, Ellis and Fallis. The Anglo percentage at Bradley was thereby reduced from 93.2% to 83.7%. The Anglo percentage at Ellis was reduced from 81.9% to 66.8% and the Anglo percentage at Fallis was reduced from 86.7% to 74.1%.[9]

EBERT

Ebert School with an Anglo percentage of 10.1% of 268 students was proposed to be closed. Its students were divided up among Lincoln, Steele and Washington Park Schools. The Anglo percentage at Lincoln which totaled 76.3% was thereby reduced to 69.1%. That of Steele which had been 70.6% was reduced

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Footnotes 8. and 9. follow on next page.

8. The School Board's columnar analysis is as follows:

SCHOOL	PRESENT TOTAL ENROLLMENT	PROJECTED TOTAL ENROLLMENT	PRESENT ANGLO %	PROJECTED ANGLO %
Boulevard (to be closed)	259	0	27.0%	0
Ashland	501	760	32.1%	30.4%

9.

Crofton (to be closed)	287	0	.7%	0
Bradley	811	904	93.2%	83.7%
Ellis	629	773	81.9%	66.8%
Fallis	294	344	86.7%	74.1%

to 59.1%. That of Washington Park which had been 83.0% was reduced to 66.1%.[10]

MOORE

It was proposed that Moore Elementary School would be closed and its 425 students, 72.7% of which were Anglo, were to be transferred to Hallett School which had an Anglo percentage of 19.8%. This closing and reassignment resulted in Hallett's becoming a desegregated school with 55.9% Anglo enrollment.[11]

STEVENS

Similarly, Stevens School with 69.4% Anglo students and a total number of 278, was proposed to be closed and its student body was assigned to Stedman School with 169 students and a 5.9% Anglo percentage so that the acquisition gave Stedman 396 students, 48.2% of which were Anglo.[12]

COLLEGE VIEW

It was recommended that College View School with a total of 343 students, 64.7% of which were Anglo, should be closed and its students assigned to Gust School which had 448 students and an

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Footnotes 10., 11., 12. follow this page.

10. The School Board's columnar analysis is as follows:

SCHOOL	PRESENT TOTAL ENROLLMENT	PROJECTED TOTAL ENROLLMENT	PRESENT ANGLO %	PROJECTED ANGLO %
Ebert (to be closed)	268	0	10.1%	0
Lincoln	481	540	76.3%	69.1%
Steele	367	452	70.6%	59.1%
Washington Park	407	531	83.0%	66.1%
11.				
Moore (to be closed)	425	0	72.7%	0
Hallett	257	644	19.8%	55.9%
12.				
Stevens (to be closed)	278	0	69.4%	0
Stedman	169	396	5.9%	48.2%

81.0% Anglo enrollment. This closing and reassignment gave Gust a total of 791 students, 74.0% of which were Anglo.[13]

EMERSON

Emerson Elementary School with 172 students, 54.1% of which were Anglo, were in the plan to be assigned to Wyman School which had 273 students, 27.5% of which were Anglo. The resultant number and percentage for Wyman was 445 students, 37.8% Anglo.[14]

ELLSWORTH

Ellsworth with 91 students, 64.8% being Anglo, was to be closed and its entire student body assigned to Steck School which had 335, 77.6% being Anglo. The result of this transfer was that Steck would have had 426 students and an Anglo majority of 74.9%.[15]

ELYRIA

Elyria School was to have been closed with 91 students, 16.5% of which were Anglo. It was proposed that these students be assigned to Swansea, 29.5% being Anglo. The resultant student body of Swansea would have been a total of 725

Footnotes 13., 14., 15. follow this page.

13. The School Board's columnar analysis is as follows:

SCHOOL	PRESENT TOTAL ENROLLMENT	PROJECTED TOTAL ENROLLMENT	PRESENT ANGLO %	PROJECTED ANGLO %
College View (to be closed)	343	0	64.7%	0
Gust	448	791	81.0%	74.0%
14.				
Emerson (to be closed)	172	0	54.1%	0
Wyman	273	445	27.5%	37.8%
15.				
Ellsworth (to be closed)	91	0	64.8%	0
Steck	335	426	77.6%	74.9%

students, 27.9% of which would have been Anglo.[16]

Additional proposed closings include the old buildings at Columbine School, a totally black school. The Board proposed that 225 of Columbine's students be bused to predominantly white schools resulting in a projected enrollment of 524 black students in the remaining new building.

The Board would also close an older section at Mitchell School to be razed and its minority population of 97.1% would remain in the facilities constructed in 1964 and 1974.

Similarly, the older sections of Whittier would be closed. Two hundred and sixty of its students were to be bused to predominantly Anglo schools, leaving 352 minority students with the exception of 1.4% Anglos.

Enrichment Centers

The other important aspect of the School Board's plan is the creation of so-called educational enrichment centers, section IV. These undertake special pro-

Footnote 16. is on the next page.

16. The School Boards' columnar analysis is as follows:

SCHOOL	PRESENT TOTAL ENROLLMENT	PROJECTED TOTAL ENROLLMENT	PRESENT ANGLO %	PROJECTED ANGLO %
Elyria (to be closed)	91	0	16.5%	0
Swansea	634	725	29.5%	27.9%

grams in an integrated setting. Students from surrounding areas would be bused to one of the enrichment centers for a period of three weeks for half days each semester. Basically, this would serve as the integrating experience for the students in the concentrated minority and Anglo schools which, as noted above, were not directly affected by the school closing program.

At the junior high and high school levels no effort was made to carry out any desegregation programs. At the same time, Morey Junior High, a centrally located school, would have been closed under the plan and would have served as an enrichment center for the segregated minority schools and the non-integrated Anglo junior high schools. Again, special programs were to have been offered for three week periods on a half day basis at this enrichment center and transportation was to have been provided by the School District. The Board's plan also goes into some detail in describing the programs which have developed and are now developing in some of the minority schools such as Cole and Manual. Its view is that

these also compensate at least in part for the continued segregation in these and other schools.

THE PLAINTIFFS' PLAN

The plaintiffs' program is entitled: "Proposals for District-Wide Desegregation and Quality Education." The several components include desegregation of students, faculty, administration and staff; integration of students, faculty, administration, staff and parents; adequate explanation to and education of the entire community, that is, explaining the reasons for and the purposes of the plan and, similarly, education of teachers and administrative personnel; installation of relevant and necessary curricula to improve the quality of the education; provision of supportive services such as transportation, counseling, nutrition, health and discipline; equalization of facilities and, finally, ongoing monitoring. It states that its crucial aspect is reassignment of students so as to bring about

a desegregated unitary system.

Those elementary schools which are presently integrated under the plaintiffs' plan would not be subject to student reassignments. The plan would, in addition, discontinue those desegregation orders which have been heretofore given by this court. In thus starting anew it seeks to bring about reassignments which are equitable, that is, which equalize the burdens of busing between minority and majority students. There would be no reassignments as to the kindergarten children. Voluntary open enrollment would be discontinued. The pairing or clustering of elementary schools in order to carry out desegregation is its most important aspect.

The manner of pairing calls for dividing the grade structure so that grades 1-3 are to be put together in one school and 406 in another. Or grades 1 and 2 would be in one pairing and grades 3-6 in another. Alternatively, grades 1-4 would be put in one group and grades 5 and 6 would go into another. Then all students in one group of grades would go to one school and all students in the other group of higher grades would go to

the other school in the pair. In the situation where three or four schools are clustered the same approach would be followed, whereby particular grades would go to one school or the other. Thus, each school cluster would entertain a limited number of grades. Here again, more than one school might be offering grades 1-3, for example, or grades 4, 5, and 6. Thus, the divisions would be along this line, and according to the plaintiffs' plan this would furnish more flexibility in that it would allow desegregation of a large school by use of schools with a smaller student enrollment.

Actual pairings and clustering are set forth in the plan for 70 elementary schools. Obviously, this requires a great deal of transportation. It is said that the net increase in transported elementary children would amount to an estimated 12,257. At the junior high level the number of children transported would be 7,247, or 9,728 if current hazard transportation is continued. Plaintiffs' plan proposes to desegregate the junior high schools by continuation of the classifications that are contained in connection

with the elementary schools. Thus, the paired schools would be assigned to the same junior high school. This would insure, so the plaintiffs contend, a continuity of the same students throughout elementary school and junior high.

Recruitment

The plan also calls attention to the small number of minority teachers, particularly of Chicanos. For example, there are only 3.3% Chicano teachers in the elementary schools, 4.0% in the junior high schools and 3.5% in the senior high schools. The percentage of black teachers, although somewhat higher, being 10.8% in the elementary schools, 9.9% in the junior high schools and 5.8% in the senior high schools, is also considerably below the ethnic percentages. Plaintiffs' plan recommends that adequate numbers of minority faculty and other personnel be assigned to schools which are to receive minority students under any plan adopted. It also recommends an affirmative program for employing black and Chicano teachers and administrative personnel. It seeks 27% Chicano teachers at the elementary level and an appropriate number at the

other levels based on the percentage of Chicano students. It opposes assigning a token minority teacher to a school as being ineffective. It also recommends the hiring of minority aides, including student teachers, parents and teacher assistants to bring the minority representation and school personnel into some kind of balance.

Inservice Training

The plan also recommends the training of school personnel in such fields as human relations, minority history and culture, administration of discipline, teaching and working in an integrated environment and an ongoing program for all new personnel. Stressed also is the necessity for compelling attendance at such training sessions. The need to obtain financial assistance for these training programs by applying to HEW, Colorado Department of Education, the National Education Association and the Colorado Education Association is stressed. It is recommended also that the District use all community resources capable of helping in the preparation and implementation of the plan including the Chamber of Commerce,

the Junior Chamber of Commerce, the League of Women Voters and other similar organizations. Also recommended is the commencement of the orientation program as soon as possible including the scheduling of visits to the schools by the students who are going to be reassigned, so that they may become acquainted with the building as well as the teachers and counselors.

Bilingual and Multicultural Programs

In addition to their desegregation plan, plaintiffs have endorsed a proposed educational plan for the Denver Public Schools submitted by intervenors Congress of Hispanic Educators. This "Cardenas Plan", which was prepared by Dr. Jose Cardenas, is directed toward dealing with the problems which minority children, and in this instance particularly Chicano children, encounter in today's typical urban American school system.[17] Broadly

17. The Congress of Hispanic Educators has also prepared an addendum to the Cardenas Plan which attempts to make specific recommendations for adapting and implementing the Cardenas Plan in Denver. This addendum has also been submitted to the court.

stated, Dr. Cardenas' educational plan is based upon his contention that modern American schools are oriented primarily toward the education of middle class Anglo children, and that the resulting programs are frequently incompatible with the needs and characteristics of minority children. The plan groups the incompatibilities experienced by minority children into the broad categories of poverty, language, culture, mobility, and perceptions. The thrust of the plan is that the educational system should be altered where necessary to eliminate these incompatibilities, rather than requiring the minority child to reject his own cultural, linguistic, economic and other characteristics in order to adapt to an educational program imposed upon him.

A more detailed analysis of the bilingual approach is appended hereto.

COMMENTS ON THE PLAINTIFFS' PLAN

As is apparent from the above description, the plaintiffs' plan is what

is known as a pairing plan calling for the busing of one-half of the student population in each of two schools or a total of one-half in a group of clustered schools. The difficulty we find in possible adoption of this is, first, that it is too tightly structured. It undertakes to govern the child from the time he commences the first grade in elementary school until he has completed high school. Each component is interrelated with the other so that if for any reason one part fails it may well have repercussions on the remainder of the program and it could create chaos. Its complexity would require a resident expert. Second, it involves extensive busing and does not distinguish between busing the minority and majority students. Thus a movement of minority students to a non-integrated Anglo school would oftentimes carry not only minority students but many Anglo students as well. The opposite would also be true. The movement of Anglo students would in many instances carry with it minority students to what had been a minority school. Third, the way the plaintiffs propose the plan, there is no

room for adjustments because the teacher at the minority school, for example, would be automatically reassigned to the majority school to teach that particular grade. At the receiving school there would be at least two first grade classes, two second grade classes and two third grade classes, so it would be impossible for any students to remain at the neighborhood school. The system would work better in schools which are highly concentrated. The criticisms mentioned would not be significant if there were one percent or two percent of the opposite race transported. In our school system we have some schools of this character, but these are the exceptions. In most schools the concentrations, although often heavy, are less extreme and therefore a large number of Anglos would be bused with minorities. More efficiency would exist as well as less basis for criticism if the transportation system were confined to either minorities or Anglos.

The pairing plan has some obvious advantages. The busing is shared equitably. The plan seeks to systematically avoid busing any person or group for a

longer period than necessary. The advantage most often emphasized is that the groups of students will remain together, notwithstanding busing, as they pass through the various grade levels in the same way that they would if there were no desegregation plan. Furthermore, the frustration of transportation may be somewhat reduced from the fact that under the plan the local school no longer serves particular grade levels so that there can be no class at the old school.

One obvious advantage which the plan utilizes is the continuing relationship between the paired neighborhood school or home school and the receiving school or schools. This lends itself to some community support essential to any school system.

In the final analysis, however, because of its extensive transportation of students, plaintiffs' program is unacceptable as presented.

COMMENTS ON THE SCHOOL DISTRICT'S PROPOSED PLAN

The special education programs which are suggested involving the enrichment offerings together with the open school concept and the special programs designed for use in segregated schools are desirable, but the emphasis is on enriched education and can scarcely be considered a plan for desegregation. Thus, the transporting of students from concentrated schools to enrichment centers for three weeks on a half day basis to intermingle with other ethnic groups while engaging in special programs does not pretend to be a desegregation plan. It impresses us, on the contrary, as a plan designed to avoid adoption of a desegregation plan. By closing schools in the center of the city it renders integration a virtual impossibility because it isolates the segregated schools north from the non-integrated schools in the south. For this reason alone, the plan must be rejected.

The numerous school closings which are an integral part of the plan likewise

make little contribution to desegregation. Its failure to deal adequately with the problem or to desegregate heavily concentrated schools causes it to fall far short of an acceptable effort designed to satisfy the Supreme Court mandate.

Its recognition of the need for adding minority teachers and for their assignment in all of the schools is desirable. Similarly, its provision for in-service training of teachers and staff, and its enhanced efforts to understand minority students are also praiseworthy But little in the way of specific programs for accomplishing these objectives are to be found.

But in the final analysis, the plan must be condemned because of its tendency to further isolate the minority students in concentrated minority schools in the north from the new majority schools which have been concentrated in the new residential areas of the south, the effect of which would be to render integration highly difficult.

INADEQUACY OF BOTH PLANS

Having considered the various aspects of each proposed plan in some detail, we conclude that neither proposal is acceptable in present form. The plaintiffs' plan meets the constitutional standards for desegregating a dual system, but it achieves that goal at the expense of excessive busing. In pairing some of the elementary schools, for example, plaintiffs were inattentive to geographical considerations, thereby causing unnecessarily long bus rides and thus undermining the feasibility of the plan. Plaintiffs' plan is unduly complex and unadaptable to Denver's segregation problem.

Defendants' plan is subject to more serious objections:

1. It is, in our view, unconstitutional and equitably defective. A basic inadequacy is found in its definition of a desegregated school as one having an enrollment of 25-75% Anglo. A school, for example, with 25% Anglo and 75% minority population continues to be a recognizable black or Chicano school;

hence, the plan would continue the dual system.

2. The educational opportunity in the minority school has been proven in our present trial as well as in previous trials to be inferior to that in the majority schools. To continue segregation increases the likelihood of continuation of inferior educational opportunity for the minorities.

The effort by defendants to achieve a modest level of integration through the expedient of closing 11 inner city schools and opening four elementary and one junior high enrichment center fails to achieve integration. It may succeed in improving the educational opportunity. This improvement could, however, be accomplished without transportation.

3. The schools sought to be closed are inner city schools which are conceded to be structurally sound and are located in neighborhoods which are desirable to be maintained as family neighborhoods. The closing of the schools would inevitably result in changing the character of areas which are favorably located for achieving integrated neighborhoods and

integrated schools. If these closings were allowed to be carried out, families would be discouraged from moving into the central area of the city. The closings tend to waste resources and facilties without providing counterbalancing improvements.

Finally, the enrichment center concept is not here condemned. The administration is encouraged to continue innovative approaches to arts and sciences. However, this should be advanced throughout the system and not as a part of a very limited integration effort. As it is now presented, the enrichment center concept provides for such a limited part of the educational experience that it must be regarded as insubstantial.

It cannot be said that all of the school closings are unjustified. Thus, where it appears that the facilities in question need to be closed for reasons other than desegregation, there appears to be no reason to prevent the closing. This is true of Elyria, part of Whittier, part of Columbine and Mitchell. These latter three proposals would not close the school in its entirety and thus de-

prive the neighborhood of a school.

In view of the fact then that neither plan promised to fulfill the court's needs, it became apparent at the end of the hearing that a fresh effort was needed. The court gave the parties its own thinking and guidelines and commenced an independent study for the purpose of developing a workable plan or program.

THE LEGAL AND FACTUAL NECESSITY FOR THE COURT TO FASHION A PLAN

In Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 91 S.Ct. 1267, 28 L.Ed.2d 554 (1971), the problem of an uncooperative Board of Education was present just as it is here. The Supreme Court there pointed out that the school board has the obligation to desegregate a dual school system and to produce a sufficient desegregation plan, and that only after it is apparent that the district will not discharge this duty is it appropriate for the court to take the initiative. With this in mind, we have

given the Board every opportunity to discharge its duty but to no avail.

Following the trial which tested the sufficiency of the plaintiffs' and School Board's plans, and following the court's conclusion that both plans were inadequate, an effort was made to have the parties collaborate on implementing suggested guidelines furnished by the court. This, however, failed. The court ordered the professional staff of the School Board to present certain work-ups and in response to these orders there were some submissions, but the court found it impossible to work with the Board in the preparation of a plan much less have the Board do it because of their adamant opposition to any kind of a scheme which called for transportation. Indeed, at the March trial the individual Board members made it clear that they would oppose any plan (including their own) which made provision for busing. Minority members of the Board did not hold this view, but this was of no aid in obtaining production of a valid plan.

The present attitude is not anything new because throughout this litiga-

tion the Board has had fairly much the same approach. During this time opposition to busing has been exploited as a political issue and the Board has steadfastly refused to take any action which might compromise its position in this regard.

But even though it has seemed clear throughout that the Board would continue its refusal to act, we have given them repeated opportunities to carry out their obligation to fulfill requirements of law, but each of these efforts has failed. In these circumstances the court has no option but to take the initiative. See C[illegible] v. County School Board, 391 U.S. [illegible] 88 S.Ct/1689, 20 L.Ed.2d 716 (1968) and Brown v. Board of Education, 349 U.S. 294, 75 S.Ct. 753, 99 L.Ed. 1083 (1955) (Brown II). In the latter case the Supreme Court said that in default of the School Board's performing acceptably, the court must exercise its equitable powers to provide a plan of its own which will provide constitutional relief. In Swann, supra, at 15-16, the Court said:

> If school authorities fail in their affirmative obligations under

> these holdings, judicial authority may be invoked. Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies....
>
> In seeking to define even in broad and general terms how far this remedial power extends it is important to remember that judicial powers may be exercised only on the basis of a constitutional violation. Remedial judicial authority does not put judges automatically in the shoes of school authorities whose powers are plenary. Judicial authority enters only when local authority defaults.

The record in this case is replete with evidences to support the conclusion which the court has reached that further efforts to persuade, coerce or otherwise force the School District to develop a plan for desegregation would be unavailing and that, therefore, it has become essential for the court (with the aid of

an expert) to seek a just, equitable and feasible plan. Once this became apparent the court requested Dr. John A. Finger, Jr. to proceed with the formulation of a proper plan.[18]

Accordingly, the Board has for the past four years and even in the recent past, notwithstanding the mandate of the Supreme Court of the United States, consistently resisted and opposed every desegregation effort and has sought to avoid the effects of such orders. The court finds, therefore, that the Board of Education has not in the past shown a willingness to formulate a desegregation plan; that it now refuses to do so; and that according to every probability it will continue to avoid and refuse to desegregate the school system. The court finds that further efforts to compel them to do so would be unavailing.

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18. We acknowledge the help of the administrative staff in furnishing material work-ups and information on specific demands. However, these efforts fell short of constituting a feasible plan.

THE STANDARDS APPLICABLE TO THE ADOPTION OF A DESEGREGATION PLAN

We are cognizant that the primary object of desegregation is to overcome the invidious discrimination found to exist in a dual system and simulatneously to bring about equality of education. In carrying out this objective, the effort must be to adopt reasonable and meaningful measures and to avoid unnecessary impositions and burdens on both minority and majority children.

The Supreme Court has had occasion to consider the adequacy of programs in both Green, supra, and Brown, supra. In Green the keystone of the plan was to allow each student to freely choose the school which he would attend. It was there contended by the School Board that to reject the freedom of choice approach required the Fourteenth Amendment to be construed as demanding compulsory integration. The Court pointed out that Brown II held that the inquiry must be whether a particular plan brings about the dismantling of the dual segregated school system.

It appeared in the record in Green that the freedom of choice approach had produced very little, if any, desegregation which was there present. The Supreme Court rejected it. From this it is to be concluded that an important standard in judging any plan is its ability to accomplish the task at hand. It is said that it must provide meaningful assurance of prompt and effective disestablishment of a dual system. The measures to accomplish this must be effective It seems obvious then that a system which depends wholly on freedom of choice could not effectively change the identity of a school from minority to Anglo or vice versa.[19]

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19. Such a program has been employed by the School District in the case at bar with some limited measure of success. It is said that some 800 students are enrolled in this program. No one maintains, however, that it operates to change the character of the schools involved. We agree with the Supreme Court's evaluation that it is not an end in itself. At the same time, it is not invalid and may well have some place in a plan which is other-

In Brown II, supra, the Supreme Court emphasized that in fashioning its decrees the court is to be guided by equitable principles, meaning that the decree should be flexible and adjusted to public and private needs -- in other words, that full use of traditional attributes of equity power be employed. The Supreme Court said that the trial court may take into account the public interest in the elimination of obstacles to adopting a unitary system. The Court also said that vitality of constitutional principles is not to yield simply because of disagreement with them.

In Swann the Supreme Court, through Chief Justice Burger, reviewed the prior cases which had sought to develop guides for desegregation and particularly noted the necessity for doing away with dilatoriness and observed also that the court in Green had emphasized the need for a plan which was workable and gave some promise of success. In other words, the plan must promise realistically to work and, secondly, to work now. This expres-

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wise designed to desegregate "root and branch."

sion from Green was endorsed once again in Swann. A school desegregation case, said the Supreme Court in Swann, does not differ fundamentally from other equitable cases in which constitutional rights have been violated. The Court added:

> ...The task is to correct, by a balancing of the individual and collective interests, the condition that offends the Constitution. 402 U.S. at 16, 91 S.Ct. at 1276.

Finally, the Supreme Court in Swann, recalled that in Green the terms "feasible," "workable," "effective," and "realistic" were proper qualities for testing a plan and determining whether it will work now. For example, the scope and extent of transportation would be tested on these bases; bus transportation as a means of carrying out the desegregation was expressly approved in Swann.

Accordingly, then, the basic criterion is that the plan shall be meaningful and therefore effective. It must be a feasible and realistic plan. Furthermore, it must be fair in relation-

ship to the objectives to be achieved and the manner of achieving them.

Specific essential criteria to a viable plan are appended hereto in outline form (Appendix B).

GUIDES TO FINDING A PLAN

It is often said that desegregation can be brought about without furnishing transportation. In some instances it is true that rezoning of schools does bring about integration. Where this is possible it should be carried out and busing should be resorted to only after other integration methods have failed. Once these rezoning methods have been exhausted, a transportation plan (or plans) is essential to effective desegregation. In our case every rezoning effort has been made. The court has sought a plan which would minimize busing.

It is important to emphasize that the School District presently transports some 14,500 pupils. Most of this is be-

cause of a lack of school, distance or hazard. The net gain in number of children transported under the plan which is proposed will raise the total to about 20,000 or slightly more, a net gain of an estimated 6,000.

Assignment of Students Now Being Bused

Many thousands of elementary and junior high school students are being bused at the present time because of long distance, hazardous traffic conditions or lack of a neighborhood school. Where this condition exists and pupils are being transported to a somewhat distant school, rezoning should be carried out so as to assign these students to a neighborhood school where possible. If busing is necessary after the rezoning efforts, the pupils should be transported for the purpose of aiding the desegregation of that school.

Similarly, where minority students are being bused for distance or other reasons, it is believed that they should be bused to an Anglo school and not to a minority school to add to the minority population of that school. The same principle applies to the transfer or as-

signment of Anglo students to a distant Anglo school along with minority students. This distinction has not been made in instances of mandatory busing by the School District. The tendency has been to pick up and bus groups which are preponderantly Anglo and minority and to do so without separating them. This is to be avoided. Anglo families, for example, who have moved to minority neighborhoods are not to be bused back to Anglo schools in other neighborhoods. Similarly, minority families who have moved to Anglo neighborhoods are not to be required to be bused to minority schools along with Anglo children who are being transported to these schools for the purpose of desegregation. At present, with computer printouts showing the exact composition by grids of minority and Anglo students, there is no longer any justification for transporting groups in an area and doing so regardless of the ethnic composition of that area. The transfers should operate on a specific basis.

Voluntary Open Enrollment

The School District has sought to bring about desegregation and integration

by use of volunteers. The guideline or standard for this has been whether the individual volunteer seeking transfer and transportation to another school would aid in the integration or desegregation of that school. Thus, the question was whether he was seeking transfer to a school in which he would be a member of a minority group. This program has had some limited success. But there will be a decreasing need for it in a system which is desegregated. The court is reluctant, however, to abolish it at this time inasmuch as it may have some remaining usefulness. But the School District is not to allow it to be used to defeat or avoid the desegregation plan which the court adopts. This would be true in the secondary schools as well. After the program is adopted, some further attention must be given to whether this voluntary desegregation is capable of contributing to the total program.

Percentage and Numbers Ratios as Guides for Desegregation and Integration

The court is aware that rigid adherence to percentage figures in this regard is not only undesirable but in-

valid. At the same time, some range of percentages is necessary in order to determine whether a school is segregated or is nonintegrated. Admittedly, the figures which are to be used are guidelines only, and for reasons that are compelling they are and have been disregarded.

For elementary schools the court has considered desirable a 40% minimum percentage of Anglo students, and it has considered the permissible maximum range to extend to 70% Anglo population. In the secondary schools the minimum figure that has been used is somewhat higher, and it has been considered desirable to have 50-60% Anglos in some instances. Here again a cautionary word should be added, and that is that in some instances it seems desirable to depart from these percentages. Thus, in some of the schools which have a preponderant Chicano population it has seemed to the court more desirable to pursue bilingual and bicultural programs than to change the numbers.

Home or Neighborhood School Pairing

The object of this program is to provide the educational values which are

present in the desegregated setting while at the same time preserving the advantages of having a home or neighborhood school.

In the plan which has been adopted permanent assignments from minority to Anglo schools and vice versa have been made in many instances for the purpose of bringing about desegregation and integration. In some other instances pairings between home schools and one or more receiving schools on a less than full-time basis have been employed. This is a daily program in which the minimum time which the student spends in the receiving school is one-half of the school day plus the lunch period. This is more refined than school pairing in that the pairing is by classes. Thus, in the segregated school one-half of the students in a class are transported to an Anglo or majority school and simultaneously one-half of the Anglo or majority students are transported to the minority school. The student spends a major portion of each day at the receiving school, but he commences his school day at the home school and he completes his school

day at that school. The part of the day which he spends at the paired school could vary in order to get maximum value from vehicles and in order to avoid congested traffic. For example, the transfer could start immediately after the commencement of the class in the morning or from mid-morning recess to mid-afternoon recess, but in all instances the transported student would spend his lunch period at the paired school rather than the home school. We see the following advantages in this method:

1. It serves to break the isolation which exists in segregated schools and exposes the pupils to an integrated or desegrated school setting during the heart of the school period.

2. It gives the student an identifiable local neighborhood school to maintain as an anchor.

3. The children have a neighborhood school for the purpose of extracurricular activities.

4. The local school is maintained as a social institution (and a playground) within the neighborhood. The parents in both minority and Anglo areas

retain a nearby facility and institution in which their children are enrolled with which they have personal contact. This serves as a focal point for the PTA organizations and other groups, whereby parents can exert an influence on the school, and the school, in turn, can have community support. It avoids the problems which exist when a child is assigned to a school in a distant area. In this situation the parents find it difficult to relate to the distant school. In the subject program the parents at the home school and at the paired school can exert joint influence in seeing to it that both schools are adequate.

5. The home school pairing arrangement also furnishes a flexible setting in which school officials can institute special programs in the home school to aid the desegregation process or make necessary preparation for the upcoming program in the receiving school. In the home school there could also be compensatory education, bilingual or English language training or similar specialized efforts which promise to be valuable to

the home school group.

6. The home school pairing arrangement should ease the logistic burden of school officials. Children are picked up at the neighborhood school and are delivered back to that school. Transportation being from school to school, the bus will not be required to make numerous time-consuming pick ups. Also, the buses used for home school pairing will often be available for transporting students who are assigned directly and need to be transported at the beginning and end of the school day. The home school pairing group will be transported during the day.

The plan adopted has arranged pairings which do not require lengthy bus transportation, and thus it should not be disruptive. Nevertheless, some extension of the school day may be justifiable inasmuch as the busing is not occurring at the end of the day. Hence, in effect, the time on the bus could be made up at one end of the school day or the other.

Should this plan prove impractical or disruptive so as to "significantly

impinge on the educational process," See Swann, supra, at 30-31, the framework established could always be used for full-time pairing or for an assignment system and nothing will have been lost.

Reassignment

In some instances it is necessary to reassign students in order to integrate rather than to pair schools. Even in these instances it is desirable for the students to be picked up at the home school and deposited there also. Where, however, there is no home school children must be gathered in neighborhood areas and returned to those places. We refer to students who are now being bused for distance, lack of school or hazard.

Support Programs

Any viable, feasible program which will satisfy the basic purpose of furnishing an equal educational opportunity for all should have a number of attributes:

A. There must be adequate preparation of student body, parents, and teachers. Group training programs within the neighborhoods must be carried out

so that there can be requisite preparation, whereby problems will be avoided. The School District's proposals set forth in staff studies, Part III, are reasonable and should be implemented to the extent that there is no delay in activating this plan.

B. Where distances are great, transportation should be furnished. The School District's standards of one mile for elementary schools, two miles for junior high schools and three miles for high schools seem generally to be reasonable and are adopted. The School District should continue to provide all collateral services such as hot breakfasts hot lunches, etc., for children who need them.

C. There must be an affirmative hiring program so as to increase the number of minority teachers in all of the schools. The small number of Chicano teachers is a particular problem and a tangible effort must be made by the District to increase these numbers.

D. To facilitate the teaching programs in the home school pairing program, it is desirable insofar as possi-

ble that the transported classes be accompanied by a teacher's aide. This would aid in having a coordinated effort.

ADOPTION OF FINGER PLAN

During the period from March 4, 1974, the date the first hearings were completed, to March 27, 1974, at which time hearings were resumed, there were numerous conferences and discussions between the lawyers and the court regarding efforts to develop an acceptable plan. These were all unproductive. Finally, a plan was formulated by Dr. John A. Finger, Jr. An alternative was submitted by plaintiffs. The Board of Education submitted proposals and work-ups in response to court orders. Following receipt of these submissions, hearings to consider the feasibility of the Finger plan and to consider the other submissions were held on March 27 and 28, 1974. Dr. Finger testified on direct and cross-examination as to his plan, and counsel for plaintiffs and defendants

described and highlighted their offerings. After hearing this evidence the court now concludes that the Finger Plan satisfies the court's guidelines and criteria and should be adopted.

In General

The plan is comprehensive and thorough. Moreover, it is a result of extensive, painstaking work involving the rezoning from computer grid readouts so as to fully utilize equitably and efficiently the ethnic populations within the several areas. It seeks to limit transportation except where absolutely necessary and to limit the distances to the minimum.

Use of Rezoning

First: The elementary schools: It exhausts every possibity for integration through rezoning. This is particularly true in the west side of Denver. As the court has previously noted, the schools in this area are geographically situated so as to permit this approach. Some schools in the other sections have proven suseptible to avoidance of busing by this means.[20]

Footnote 20. follows on the next page.

Second: Pairing: A total of approximately 33 schools have been desegregated by classroom or home school pairing (transported to a receiving school for a minimum of one-half time). The schools involved in these pairings are shown below.[21]

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20. Schools integrated by rezoning include:

Schmitt	Cheltenham
Columbian	College View
Beach Court	Knapp
Brown	Newton
Edison	Westwood
Ashland	Goldrick
Ashley	Godsman
Philips	Schenck
Park Hill	Valverde
Barnum	Colfax
Munroe	Cowell

Rosedale (Main attendance area Satellite H)

Thatcher-McKinley (Main attendance area Satellite H)

The Satellite H schools listed have had transported Satellite H children assigned to them.

21. Schools paired by classrooms include:

Mitchell-Force
Steel-Crofton
Knight-Barrett
Asbury-Whittier
University Park-Columbine
Washington Park-Stedman

The School District staff in one of its work-ups suggested that this half day pairing or classroom pairing provided by Dr. Finger and carried out by dividing the several classes in each school in half and transporting one-half minority students to the Anglo school and one-half of the Anglo students to the minority school might better be implemented by transporting entire grades. As noted above, division of grades allows the groups to be alternated each day or each week. Thus, students would not have to be bused every day or it could be planned so that busing would be required only on alternate weeks. One week one-half of the

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Eagleton-Doull
Bryant-Webster-Gust
Traylor, Dennison-Fairview, Greenlee
Johnson-Gilpin
Hallett-Cory-Ash Grove
Harrington-Wyatt-Ellis
Smith-Fallis-McMeen

The number to be transported in each instance is one-half of the smallest number of minority students or Anglo students in each pair. The minority students at the Anglo school are not to be bused to the minority school, nor are the Anglo students at the minority school to be bused to the Anglo school.

students would remain in the home school and the next week they would be bused to the paired school. Under the School District's suggestions, grades 1, 3 and 5 of one school could be transported to the paired school and grades 2, 4 and 6 would, at the same time, be transported to the sending school. As a result, one school would be made up of grades 1, 3 and 5 of both schools and the other of grades 2, 4 and 6 of both schools. The next day there could be a reversal. It is said that one advantage of this would be that the teacher of the class being transported would travel with the group and both first grade teachers, second grade teachers, etc., would be in the same school at the same time and could confer. The court's preference is for the transportation of one-half of each class and the maintenance of six grades in each school.

The same general flexibility could be realized by dividing up the several grades, as we have suggested, and having a full complement of grades at each of the paired schools. So also, the groups could travel on alternate days or alter-

nate weeks, for that matter, so that each child could spend 50% of the pairing period at the home school in an integrated or non-segregated classroom. The School District may, however, wish to try out the grade exchange program and the court would have no objection to this procedure. It should be emphasized that this must not be a before lunch or after lunch program. The integrated setting should last through a minimum of one-half of the school period plus the lunch period as well. There can be no compromises on this.

It is the court's view that in the process of pairing, transportation of minority students to a minority school and Anglo students to an Anglo school is to be avoided. Furthermore, in determining the number to be transported it is to be one-half of the lowest number between the two paired schools. Thus, if Doull has 582 Anglos and were paired with Cheltenham which has 464 minority students, the number transported on any given day would not exceed 232. Thus, 232 minority students would be transported to Doull and 232 Anglos would be

transported to Cheltenham. Similarly, with Traylor and Greenlee, Traylor has 514 Anglo students and Greenlee has 438 minority students. Thus, the maximum number to be bused would be one-half of 438 or 219 from each school.

Third: The other method in this plan for reducing concentrated populations in minority or Anglo schools is the assignment of students from satellite areas. For the most part, these assignments occur in the northern part of the city and go to the extreme southern part or to schools in the middle zone from the northern part. This then tends to be one-way busing. The plan seeks to compensate for the fact that the schools in the southern part of the city do not have to bus out of the area by making provision for junior high students to be bused to schools in the north and northeastern part of the city. Therefore, the balance of the burden of being transported is being carried by the minorities at the elementary school level and by the Anglos at the secondary school level, although it is paired evenly in connection with the paired approach (at the elementary level).

Fourth: The junior high schools have been desegregated for the most part by rezoning. The very worst problem of concentration and identifiable minority schools is that in Cole Junior High School, which is very nearly 100% black and Chicano; and also in Baker Junior High School, which approaches 100% minority population. Other schools which are almost equally concentrated are Horace Mann Junior High, Morey Junior High and Lake Junior High. Smiley Junior High is a borderline school which is likely to become more minority concentrated.

The plan seeks to bring about junior high desegregation and integration first by rezoning. Extensive boundary changes have been made in some instances, but only minor changes have been made in others. For example, Smiley has not been changed extensively and Hill has not been. On the other hand, in the west part of town, Skinner's boundaries have been changed considerably to aid the condition at neighboring Horace Mann. Similarly, Rishel's boundaries have been modified as have Lake's and Skinner's on the south.

It has not been possible to accomplish desegregation altogether by boundary changes, and so the plan in addition creates satellite zones for assignments out of the Cole area and Mann area, and satellite zones are set up in Kennedy Junior High School and also in Merrill and Place. The end result is "root and branch" desegregation of Cole Junior High and Baker with the aid of Byers and other schools to the south and west of Baker.

Cole, which had a minority population very close to 100%, would under the plan have its population reduced to a total of 40% black and Chicano and 60% Anglo. Mann, similarly, has been changed so that its minority population is substantially below 50%. Lake also has been reduced so that its numbers and character are drastically changed.

More important than the percentages will be the educational efforts to be made in these schools. The District has an opportunity to change the entire character of these minority schools, whereby its students can be prepared for high school on the same basis that students

in other areas of the town have been. Thus, an effort can be made to arrest and amend the deficiencies which have existed and which have prevented fulfillment of educational objectives in these areas.

Fifth: The high schools: The same kind of transformation is presented at the high school level. The symbolic dual school in the entire system is and has been Manual High School. Not only are its numbers exclusively minority, but it is plain to everyone that it is a black and, to a lesser degree, Chicano school. The staff here has performed remarkably. The effort has been to develop programs within the desires and capabilities of the students and some very fine programs, including the preprofessional programs, have evolved. Those students who wish to pursue a college preparatory program could, of course, do so. In addition, their offerings include such things as airplane construction and house construction. Nevertheless, it was and has been a different or alternative high school, and the effort of this plan is to bring about a metamorphosis, whereby

this school will enjoy the same standing and reputation enjoyed by the other fine high schools in the system. The population is changed so that 56% of the students are Anglo. This is largely effected by boundary changes involving East High School and the expansion of the East boundary lines to embrace other areas and the movement southward of other boundary lines. The creation of satellite zones for transportation out and in has also been necessary.

The population of East High School is also set at a figure above 55% Anglo. East High School has long been regarded as an outstanding institution. This tradition has been helpful in maintaining it as a good educational institution. It is believed that Manual could profit by being associated on a campus basis with East High, whereby teachers could be exchanged and the students could take some of their courses at one or the other school. Each school should, of course, have its own administrative staff, but there must be also an overall supervisor of the two schools plus a supervisory staff capable of determining the course offerings and transportation needs as

well as coordination of the two schools. This would furnish an opportunity to create a joint educational effort unmatched in this city and in this part of the country -- an institution with the very highest educational standards. Manual's progress in developing pre-medic, pre-law and pre-engineering ought to be continued and encouraged. No doubt there are other special areas in which it is able to contribute to special objectives. East also could have non-duplicative courses which would attract students who are assigned to Manual. It should be noted that these schools lend themselves to this kind of program because of their geographic proximity. The distance which separates them is approximately one and one-half miles. It is therefore ordered that East and Manual be consolidated as an East-Manual complex.

Adoption of the Bilingual-Bicultural Plan of Dr. Cardenas

In view of the very large population of Mexican-Americans or Chicanos in the Denver school system, the Cardenas or bilingual-bicultural approach to the education of this minority group is a

very sensible method and to the extent that it can be useful to building bridges between the Spanish and Anglo cultures, it is to be fully utilized. At present some initial effort is being made at the Del Pueblo Elementary School along this line and undoubtedly a good deal has been learned from this pilot or model program. It is the view of the court that this system of teaching should be installed in Baker Junior High School and West High School, both of which have large Chicano populations. It seems desirable also that it be installed in the Swansea School.

Some representatives of the Mexican American community in this case have expressed a desire not to desegregate the Del Pueblo School during the period that the program is developing. The court can see advantages in this and therefore holds that desegregation is not in its best interests. The Swansea School does not offer any serious segregation problem since it now has approximately 35% Anglo population and thus reassignments are not necessary here either and, again, the bilingual program should be installed at this school.

The exact mechanics for implementing this program are not clear and, therefore, the School District must employ consultants to aid this process.

It is recognized that most of our Spanish surnamed or Mexican American children are able to speak English and thus teaching in the Sapnish language would not be necessary. Nevertheless, the Spanish language is a more natural one for a great many Spanish surnamed or Mexican American students. Thus extensive curriculum offerings in the Spanish language and in Spanish culture would be appropriate in the mentioned schools.

As noted, further comments and an analysis of the Cardenas plan is appended to this opinion, and the Cardenas plan itself is in the record in this case.

Comments on Written Objections to Finger Plan

We have reviewed the objections raised by the School District to the proposal of Dr. Finger and in some instances have made corrections to comply with their requests. On the other hand, the objections which they make which go to the method and philosophy of the de-

segregation and integration plan must, of course, be rejected. For example, they object to our rezoning numerous elementary schools, some of which satisfy the integration guidelines. This, however, is to bring about integration of neighboring schools and is done in this manner so as to avoid busing, to which the School District is also vigorously opposed. Therefore, the assertions that needless rezoning has taken place are not valid.

As to the junior high schools and high schools, it is quite true that Manual is the only seriously segregated high school. Adjustments have, however, been necessary in the case of the other schools in order to bring about the desegregation of Manual and in order to reduce the minority population of East High School as well.

It is said that the population of West High School has been reduced substantially. The Finger Plan accepted the figures that were presented in the School District's computer printouts. It is true that a segment of the attendance zone has been reassigned and that this

was largely a minority area, but an equal number or even an increased number, according to the printout, has been newly assigned to West High. It is predicted that when the actual attendance is counted, West will have the same number of students that it had before, perhaps a few more, and will have an Anglo percentage that is or is close to being within the court's guidelines.

The objections about the closing of schools are in respect to the Alcott-Smedley pairing and the mention of a new school. This can be adjusted in 1975 when the new school is opened. As to the Carson Elementary School, Dr. Finger was entirely cognizant of its limited capacity. The presence of its special programs was fully considered and it is capable physically of entertaining the additions.

If, as the School District contends, there is an over-capacity in some of the junior high schools, boundary adjustments can be made so long as they do not interfere with the ethnic percentages which have been achieved. It is anticipated that a number of adjustments

will have to be made; that it is impossible to discover every problem.

While the court appreciates the School Board's objections and recognizes that Dr. Finger could have done better, it must be pointed out that the District which is vociferously complaining did not utilize its opportunities to make positive offerings and, therefore, their objections have to be treated in this light. For example, they now, at this late hour, April 4, 1974, say that they would prefer <u>their</u> paring [sic] program to the one that the court has indicated a preference for. Needless to say, it would desegregate only the fourth, fifth and sixth grades of elementary schools. Apart then from its weak and late endorsement, it is unacceptable.

We have considered the plaintiffs' objections which are predicated on effectiveness, workability, fairness and legality, and we do not see any necessity to comment on these beyond saying that it is a very thorough columnar analysis which in substance declares that the plaintiffs' or the Stolee plan would be better. It is true that in some respects

the Stolee plan might better satisfy the mentioned criteria. In other respects, neither the original nor alternative Stolee plans are as conceptually sound as the FInger Plan. We see no basic difference in the principle between the Stolee plan and the Finger Plan. The difference is in the Finger Plan's more efficient avoidance of transportation and more efficient utilization of transportation and the Finger Plan's concentration on the more serious problems. Overall, the Finger Plan appears to the court to be more equitable and equally effective, workable and legal.

As to plaintiffs' criticism of the classroom pairing part of the Finger Plan: True, community acceptance is not to override considerations of constitutionality and validity, and in commenting on the instant pairing system this has been made entirely clear. There is a more basic principle involved. There is much value to be derived from the home school as we have pointed out and no great virtue per se in abandoning it since it does provide more family support in the program and, therefore, has some social value. Whereas fulltime pairing

furnishes more time in the integrated atmosphere which is also valuable, there is no great virtue in relinquishing family control of the child in favor of control by the school authorities. Denver people, minority and Anglo, are devoted to the neighborhood school and the values which are to be derived from it. This fact would not justify adoption of an unworkable plan, however, or an illegal plan, but we do not perceive constitutional or legal objections to the plan. The question is then will it work as well as full-time pairing. There is every reason to believe that it will.

The intervenors', Congress of Hispanic Educators', objections have been considered and, for the most part, their problems have all been corrected.

The foregoing is not a detailed exposition of the Finger Plan. An accompanying decree will contain its specifics including reference maps. The narrative herein modifies the plan somewhat, but it is substantially the same. The plan, as modified, is adopted and its formal adoption will be set forth in a separate decree. The court finds that the plan is

feasible, reasonable and equitable in that it seeks to bring about the necessary changes with a minimum of disruption and difficulty. The busing distances are not great. The accompanying maps demonstrate that a distance of eight or nine miles is comparatively lengthy and that most of the distances are three, four or five miles. Also, the plan seeks to prevent unnecessary and disproportionate transportation. The other methods employed have been selected with a view to consideration of the problems of the children involved and with a view to sparing the imposition of burden on them as much as possible.

The kindergartners are not included in any assignments. The elementary grades are related to their home schools and are very carefully controlled and returned to home schools in most instances rather than to neighborhoods. The plan is equitable in that it seeks to prevent disproportionate transportation burdens.

The plan shows promise of success provided there is a positive effort on behalf of interested members of the community.

Any plan is, of course, imperfect. It can be said for the present plan that the utmost care was exercised in its adoption, and it can be said also that, considering the scope, magnitude and extent of the problem presented, it appears to be and the court so finds that it is well balanced, most equitable and most feasible.

It is concluded, therefore, that the plan is to be adopted as modified and it is directed that the parties submit a formal decree incorporating the plan's narrative portions and directing its adoption and imposing the requisite injunctive provisions. The formal entry of judgment will await the presentation of the mentioned decree.

APPENDIX A

ANALYSIS OF THE "CARDENAS PLAN" SUBMITTED FOR THE COURT'S CONSIDERATION BY INTERVENORS, CONGRESS OF HISPANIC EDUCATORS

The Congress of Hispanic Educators, one of the intervenors in this action, has submitted for the court's consideration an education plan for the Denver Public Schools prepared by Dr. Jose Cardenas, as well as an addendum to that plan which attempts to adapt the plan to the specific conditions in the Denver schools. Dr. Cardenas' educational plan is directed toward dealing with the problems which minority children encounter when they are introduced to a school system which, Dr. Cardenas asserts, is oriented more to educating the middle class Anglo youngster than the poor minority child.

While many of the elements of Dr. Cardenas' plan are equally applicable to the problems of all minority groups, the plan is particularly directed toward the educational problems of Mexican American children, who comprise an appreciable seg-

ment of the pupils in the Denver school system. Briefly stated, Dr. Cardenas recommends adjustments in the Denver educational system over a wide range of areas which he feels will make that system more compatible to the minority child's economic circumstances, his cultural and language orientation, his high degree of mobility, and his perceptions of himself and the world around him. Dr. Cardenas' plan is at heart based on the conviction that minority youngsters often fail or perform poorly in the typical American school system today, because the school the child attends, whether integrated or segregated, is largely an alien world to him, where classes, including the most basic of skills, are taught in a language which the child often does not comprehend or lacks facility in, where he is asked to relate to experiences which have no relevance to him outside the school, and where he is often taught to regard negatively his own background, culture and personal abilities.

The basic goal behind the constitutional requirement of desegregation of the public schools is to end the social

isolation of minority children which hinders or prevents them from entering the mainstream of American society. As was stated in Brown I, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954):

> To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.

347 U.S. at 494.

The Court at the same time emphasized the critical importance which an adequate, meaningful, equal education plays in insuring the minority child a place in American society:

> Today, education is...a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is

> denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.

347 U.S. at 493.

It seems apparent that a school system should strive to make the "opportunity" of an education something that all children in that system can avail themselves of. Otherwise much of the value and purpose of requiring the dismantling of illegal dual systems is dissipated. It seems particularly important at the present time that the Denver educational system be responsive to the educational needs of minority black and Chicano students as well as those of the majority Anglos.[1]

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1. According to figures compiled by the School District at the commencement of the 1973 school year, black and Chicano students constituted 17.6% and 27.0% respectively of the total elementary school enrollment in the District. The minority percentage was slightly lower in the junior high and high schools.

One educational element called for by the proposed Cardenas plan is the utilization of bilingual training, particularly in the low elementary grades. Currently many elementary school Chicano children are expected not only to learn a language with which they are unfamiliar, but also to acquire normal basic learning skills which are taught through the medium of that unfamiliar language. Some provisions for effecting a transition of Spanish-speaking children to the English language will clearly be a necessary adjunct to this court's desegregation plan.[2] Furthermore, this court is mindful that meaningful desegregation must be accompanied by some appropriate alterations of existing educational programs in order to adequately deal with new problems which will arise in the operation of desegregated rather than segregated schools.

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2. See Lau v. Nichols, 414 U.S. 563, 94 S.Ct.786, 39 L.Ed.2d 1 (1974). After integrating its school system in 1971 as a result of federal court order, the city of San Francisco had over 2,800 students of Chinese ancestry in the school system who were non-English speakers. Supple-

The type of educational program proposed by Dr. Cardenas is particularly appropriate for the Denver school system because of the city's and region's long tradition of Mexican and Chicano influences. Additionally, Colorado law specifically encourages the use of bilingual and multicultural programs such as

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mental English courses were given to only about 1,000 of these students. Emphasizing that California law placed prime importance upon use of English in the school system, although permitting bilingual education under certain circumstances, the Court found the situation as it existed in San Francisco to be violative of §601 of the Civil Rights Act of 1964, 42 U.S.C. §2000d. That section bans discrimination based "on the ground of race, color, or national origin," in "and program or activity receiving Federal financial assistance." (San Francisco's schools were receiving large amounts of federal assistance.) The Court expressly declined to reach the issue of whether the condition also constituted a violation of the Equal Protection Clause of the Fourteenth Amendment.

those proposed by the Cardenas plan to effect an enriching and non-disruptive transition of minority children from their dominant language to the effective use of English.[3]

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3. 1963 crs 123-21-3. Policy of state to instruct in English -- exceptions -- Instruction in the common branches of study in the public schools of this state shall be conducted principally through the medium of the English language; except that it shall be the policy of the state also to encourage the school districts of the state to develop bilingual skills and to assist pupils whose experience is largely in a language other than English to make an effective transition to English, with the least possible interference in other learning activities.

123-21-4. Teaching of history, culture, and civil government -- (1) The history and civil government of the state of Colorado shall be taught in all the public schools of this state.

(2) In addition, the history and civil government of the United States, including the history, culture, and contributions of minorities, including, but

Most of the opposition to the Cardenas plan generated during the evidentiary hearings went to the practicality of the plan and to problems of its implementation rather than to the educational principles espoused. Clearly the plan in the scope proposed could not be fully implemented throughout the district immediately. The plan would require coordination by the School District with other city and state agencies, hiring of new faculty and administrative personnel or additional training of current personnel, and experimentation to determine which specific aspects of the plan are best suited to Denver's situation. Nevertheless, the court feels that a prompt start should be made in a pilot program for implementation and utilization of the Cardenas plan, or something similar to it, in Denver. The court proposes the use of the Del Pueblo Elementary School as a voluntary open school for implementation of the plan during the

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not limited to, the Spanish Americans and the American Negroes, shall be taught in all public schools of the state.

1974-75 school year, with similar programs to be developed on a pilot basis at Baker Junior High and West High, as they are constituted under the court's final desegregation plan. Similarly, Garden Place and Swansea Elementary Schools appear to the court to be proper subjects for the pilot program.

APPENDIX B

OUTLINE
CHARACTERISTICS ESSENTIAL
TO A VIABLE PLAN

I. Constitutionality
   A. Must desegregate and must do so now.
   B. Plan must be equitable.
      1. Both Anglos and minorities must assume their fair share of the burden. Plan is not to be too onerous on any one ethnic group.

II. Feasibility
   A. Plan must be workable but this is not to be tested by universal acceptance.
   B. Simplicity
      1. Avoid unnecessary disruption of the beneficial non-segregative aspects of the present educational system.
   C. Continuity
      1. Develop an overall desegregation program that will provide a measure of con-

tinuity between a child's elementary, junior high school and high school education.

D. Minimize busing by utilizing the relocation of attendance zones.
   1. Employ walk-in integration wherever possible.
   2. Wherever possible, bus children who are already being bused because they have no schools in their own neighborhoods.

E. Where long-distance busing <u>is</u> unavoidable.
   1. Avoid rush-hour traffic by pairing schools and sending children back to their neighborhood schools before the end of the school day.
   2. Where schools are participating in long-distance busing, allow parents to attend PTA meetings at their neighborhood school if transportation is a

problem.

III. Providing Equal Educational Opportunity for All

A. Allow bilingual approach to learning for Spanish speaking children.

B. Provide mulitcultural educational approach for all ethnic groups.

C. Provide collateral services (hot breakfasts, hot lunches, etc.) for children in need of them.

D. Pursue affirmative action program in hiring minority teachers, striving for an integrated faculty in all schools.

E. Maintain high quality of education, making curricular adjustments to meet the needs of an integrated student body.

F. Where pairing is employed:

1. Allow children to attend their neighborhood schools at end of day to receive special or individualized training (i.e., reading in Spanish, special help for

slow readers, etc.).

2. Provide carefully designed programs in neighborhood schools at end of day to encourage insight and understanding by discussing the benefits and problems of living and working together in an integrated environment.

IV. Execution of the Plan

A. Program for educating staff, parents and students as to the problems which they must anticipate and deal with. See plan of school administration, Defendant's Exhibit ZB-III.

B. Appoint a Monitoring Commission composed of outstanding members of the community. Duty will be to observe the execution and report to the court.

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PREPARATION FOR INTEGRATION STAFF, PARENTS, STUDENTS

It is imperative that administration and staff have time (minimum of 3 months) to carry out programs in all schools to insure that the process of integration has the optimum opportunity for success. With careful preparation and time for discussion, friction, conflict, and violent eruption will be avoided. With time to plan and implement a variety of activities, school climate can be enhanced so that a learning situation is created which will be responsive to children's needs and interests. Other desegregation processes have included a rigorous campaign of preparation of teachers, students, and parents over a period of time spanning a number of months.

	Tentative Time Line	Resources
In the process of changing schools, children are subjected to many physical, emotional, and psychological stresses. The time allotted for preparation of pupils, faculty, and parents will bear a direct relationship to the time needed for making the transition effective for each child involved. It has been demonstrated that the only way that integration can work is through the understanding and total cooperation of all persons and communities involved.	April 1	A special task force will be appointed by the Superintendent to assist with planning the integration activities necessary for an effective build-up toward implementation and to assist with procurement and scheduling of human and material resources needed.
Students involved in school changes as a result of integration are likely to be facing adjustments beyond any they have previously experienced; consequently, the need for careful planning for school adjustment will likely be compounded for most children.		
The planning for integration should be developed in three distinct phases: 1. Pre-integration activities 2. Transition period activities 3. Sustained or continuing activities		
I. Pre-integration activities A. Total staff of Denver Public Schools 1. Complete explanation of total plan via Channel 6 during school day.	April 3	Superintendent and Staff

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	Tentative Time Line	Resources
2. Central office staff will have a point of contact designated so that school administrators will have an immediate response to questions or referral to appropriate information or resources. In addition, central office staff will have thorough orientation to the total plan. Mandatory workshops to assess and deal with attitudes, more effective communications, and assistance to principals and school staffs will be implemented.	April 1	The Office of Community Specialists and the Office of School Community Relations will become a point of contact and a clearing house for information and referrals. The Special Task Force will be allocated to assist.
	April 1, 2	Assistant Superintendents will orient and then meet with total staffs and individuals to plan for optimum implementation.
	April 2, 3, 4, 5	
B. Principals		
In-service workshops for all elementary administrators are scheduled to begin in April and continue for a six-week period. Workshops will deal with communications, educational innovation, and program implementation and interpersonal relationships.	April 1	Department of Elementary Education and Community Specialists Colorado University
1. Presentation of details related to a principal's school will follow orientation to the total plan.	April 4, 5	Departments of Elementary and Secondary Education Pupil Services Research Services
2. A plan for communication with central office and other principals will be implemented.		
3. The principal's role will be explored through mandatory workshops with emphasis on: (a) Attitude assessment and follow-up programs for improving attitudes (b) Understanding of "change agent" role ○ Staff ○ Community ○ Students	April 8, 9, 15	Departments of Elementary and Secondary Education Community Specialists { Materials and procedures developed for the Stedman-Hallett and other integration implementation will be used. }

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	Tentative Time Line	Resources
4. The need for the principal's personal contact will be stressed. (a) Staff (b) Pupils (c) Community and parents		
5. Principals will mobilize resources for: (a) Information center in each school (b) Communication (c) Group interaction	April 8, 9 (Spring Intermission April 10, 11, 12)	Each Principal will reduce the details of the plan which pertain to his school to simplest terms and set up an information center so that staff, community and students may have ready access to accurate information.
(d) Orientation programs for staff, students, parents	April 15, 16, 17, 18	Principals will schedule meetings involving staff, parents, students, to provide for idea exchange related to implementation of integration and to orient all concerned regarding plans for implementation.
C. Staff (includes all employee categories at each school and all supportive personnel)		
1. Explain implications of plan for each job and person	April 8, 9, 15	All employee categories (aides, custodians, clerical, lunchroom, bus drivers, teachers) will be required to have personal contact with the Principal to discuss how the plan may affect each job and person.
2. Attitude assessment and follow-up programs for improving attitudes	April 17, 18, 19	Principals and Department Heads will assess through required group and individual discussions, attitudes and define areas of need and communicate with Community Specialists regarding implementation of strategies for improvement.
D. Teachers		
1. Provision will be made for teacher-teacher idea exchange between sending and receiving schools	April 22–26 and May 13–17	Principals of paired or involved schools will schedule required joint faculty, grade level, or subject area meetings for the purposes of idea exchange, coordination of instruction programs, instructional material

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	Tentative Time Line	Resources
2. Intensive workshops ○ Student-student relations ○ Student-teacher relations ○ Teaching strategies ○ Intra-staff relations ○ Plans for parent involvement ○ Teacher-parent relations	May 20–31	needs and special student identification and needs. Some interschool visitation may be provided during the regular school day with substitute teachers provided. The Division of Education will plan and schedule mandatory workshops for teachers to be involved with the changing human relationships of the integration plan, the necessary exploration of teaching strategies, and the planning necessary for parent involvement and communication. Elementary Education — Pupil Services Secondary Education — Community Specialists Curriculum Development — Federal Projects
○ Preparation for staff integration (transfer of teachers)	April 8, 9, 15, 16	Personnel Services in cooperation with Elementary and Secondary Education will assist principals with identification of staff balance parameters and with the designation of teachers who need to be transferred. All principals and teachers will be provided with written information related to the procedures to be followed in making necessary transfers. Teachers to be transferred will be identified and informed no later than April 12. Teachers to be transferred will be given an opportunity for visiting their new school of assignment for conferences with the principal and orientation to the assignment.
E. Students 1. Inter-school visitation 2. "Buddy" system 3. Students will be involved in activity planning	May 20–31	Principals with the assistance of the Department of Pupil Services will schedule students for visits to their new school for orientation to the school and programs. A student "buddy" system will be implemented so that transferred students will have a "buddy" to further assist with orientation and help broaden acquaintances. Transportation

	Tentative Time Line	Resources
4. Inter-school small group student activities	May 20–31	Principals of involved schools in cooperation with Pupil Services will be expected to plan and implement a schedule of small group meetings for students.
5. Workshops for students will be held to: ○ Identify and develop student leadership ○ Explore student-student relationships ○ Develop understanding of the issues and the process of dealing with them ○ Developing interest and support for integration		Guidance Services Psychological Services Social Work Services Student Activities
6. Orientation programs will be carried out in each school	August 26–30	Principal and Staff will develop and implement programs to acquaint new pupils with new and unfamiliar buildings; meet teachers and pupils services staff; other pupils assist in the assigning of lockers, etc.; orientation of new pupils to procedures and discipline of that school; also see (E–1) [*supra*].
F. Parents		
1. Parents will be given orientation to the plan for integration	April 8, 9, 15, 16	A rebroadcast of (A–1) will be scheduled during the week of April 8–12 for evening viewing by the community. Appropriate notice will be provided through each school and media releases. A special report will be provided to all homes in the District.
2. Inter-school visitation will be provided		
3. Provision will be made for parents to explore parent-school relations and needed communication		Channel 6 Press Relations and Public Information
4. Parents will be involved in planning for implementation of student transfers	May 13–17	Principals will invite parents to receiving schools for orientation and to establish communication. School district transportation will be provided, to the extent possible.

	Tentative Time Line	Resources
5. Parent-parent meetings will be held between sending and receiving schools 6. Provision will be made for parent-staff activities and planning	May 20–31	Principals will be expected to provide for small group parent meetings for the purpose of establishing planning committees made up of staff and parents.
II. Transition period activities		
A. Develop ad-hoc committees in each school to: ○ Assist with communication ○ Deal with rumors ○ Develop plans for crisis situations ○ Meet with media, prepare releases ○ Identify and solve problems	August 1–9	Principal and Staff with Special Task Force assistance.
B. A staff contact will be identified in each school so that problems are recognized and needs met.	August 1	Principal
C. Mandatory workshops from pre-integration activities will be continued to re-define immediate problems, ideas, solutions	Sept. 1–Jan. 1	Departments of Elementary and Secondary Education
D. Extra-curricular activities will be planned and implemented to provide for broadest participation	August 1, 2, 5, 6, 7 and thereafter	Office of Athletics, Recreation, and Safety Student Activities Supervisor and Transportation Department
III. Sustained or continuing activities		
A. Provision will be made for regular mandatory orientation programs for new employees	August 1 and thereafter	Division of Education and Department of Personnel Services Community Specialists
B. Continuous staff development activities will be carried out related to: 1. New teaching strategies and materials 2. Student-teacher relations 3. School-parent relations 4. Identified needs and problems	August 1 and thereafter	Through Division of Education there are existing structures to carry out these functions. Curriculum Development

	Tentative Time Line	Resources
C. Provision will be made for continuous assessment of instructional program effectiveness, and restructuring of content, methods, and materials	Presently scheduled and continuing	The regular assessment programs will be continued. Testing and Pupil Records Research
D. Parent activities will be planned on a regular basis designed to foster pride and understanding, seek solutions to problems and thus strengthen parent-school relationships	August 1 and thereafter	Continued use of committees formed in pre-integration activities
E. Committees will be formed in each school made up of staff, students, and parents to continue to direct the efforts of the school toward successful quality integrated education, i. e. continuous, on the spot professional growth	August 1 and thereafter	Principal
F. Provision will be made for continuous development of activities designed to assist students to:		
1. Maintain or improve relationships with peers and staff 2. Develop leadership 3. Identify problems and seek assistance 4. Develop pride in self and school	August and September thereafter	Principals and Community Specialists Guidance Services Psychological Services Social Work Services Student Activities

April 5, 1974

Honorable William E. Doyle
Judge, U.S. Court of Appeals
Denver, Colorado

Dear Judge Doyle:

I hereby submit to you my recommendations for the desegregation of the Denver Schools. I believe that the procedures proposed are feasible, workable, and educationally sound. You should anticipate that there will be considerable opposition from the citizens of Denver, but I know of no way to implement your responsibilities without such opposition. It is lamentable that no one speaks of the important outcomes to be achieved through the integration of schools, although I think most citizens really believe in the American ideal of equality and equal opportunity, it is understandable that the ideal gets in conflict with the desire to provide for one's children and one's own self fulfillment through one's children. I don't think most people want to condemn some children to poverty or to an unfulfilled life, but few people want to pay a price at the expense of their children to bring this about.

Despite the widespread opposition to busing, there is no evidence that it hurts anybody. The facts are that many children enjoy it. Others view it as just a thing one does like driving to work in one's car. One just does it. Some children don't like it, but that usually is because the bus is unsupervised and the children are teased or assaulted.

Everyone knows that without effective planning and sometimes with it, there will be problems of confrontations among students. Difficult as these are to deal with, students do eventually seek and find accommodation. I wish that the citizens of Denver would know and believe that the bringing of people together is better than the alternatives of keeping them apart. The research does seem clear on one point, and that is that Anglo students attending school with minority students do just as well as their compatriots in predominately Anglo schools. I think that you have thought of something quite unique in your classroom pairing idea. Hopefully you will find support among the leaders of the community in

bringing this idea to the fruition of better education. Thank you for inviting me to be your consultant.

Sincerely,

(s) John A. Finger, Jr.

JAF/lg

John A. Finger, Jr.

Introduction.

In this Denver plan four different procedures have been followed in integrating the schools in the District. All the schools have been rezoned using a gridded map showing the number of students residing in a grid. As many attendance districts as possible have been defined that will provide integrated residential attendance districts. Secondly, some schools have been integrated by short busing of minority students. Distances involved are mostly less than 3 miles and 10 to 15 minutes duration. Students involved in short busing are reassigned to schools for six elementary years. One group of 1100 minority students are reassigned to schools in the southern part of Denver for their six

elementary years. These students are assigned to junior and senior high schools to which they can easily walk. The schools which receive these minority students are receiving schools only at the elementary level. They are bused to minority schools at either the junior high school or high school level. Finally, some 12,000 students are involved in a classroom pairing plan in which a classroom in a minority school is paired with a classroom in an Anglo school.

Rezoning of School.

The Denver School Department has developed a computerized system for pupil accounting. The center of each block in the city has coordinates and the pupils residing on the periphery of the block are linked to the coordinates. The base data for rezoning has been pupils residing within approximately 3,000 foot squares (grids), but a grid is actually composed of an aggregate of city blocks. The system can provide block by block data if it is needed for fine adjustments of attendance zones.

Schools Integrated by Rezoning

Nearly 10,000 students will attend

integrated schools that are essentially walk-in integrated schools. Six hundred thirty students will have short bus runs within attendance zones because they live more than one mile from their school assignment. The court directive that schools be within the limits of 40% to 70% Anglo is essentially met in these schools, although one school is 39.5% Anglo.

Schools Integrated by Short Busing

Eleven schools have been integrated with short busing. These schools will enroll 4,300 pupils. Approximately 1,500 minority students and 400 Anglo students will be bused to these schools. Many of the minority students involved in short busing are already being bused under previous court orders. The School Department should revise these school assignments so that the schools involved in receiving short bused students receive the same students they now receive, in addition presumably to some new students.

Schools Integrated by Receiving Minority Students who will Attend Junior and Senior High Schools in their Home District

Approximately 1,100 minority stu-

dents will be bused to schools in the southern parts of Denver. These students will bear a heavy burden in bringing about integration in Denver. Special provisions should be made for these children so that their school assignments will be effective.

First, extra buses should be provided to pick up stragglers who miss the regular bus runs.

Second, provision should be made to take care of children who become ill or who must be returned home. Transportation should be provided at shool expense either for parents or children between school and home for emergency use.

Third, parents should be provided with transportation at school expense for PTA meetings or other school sponsored acitvities involving parents.

Schools Integrated by Classroom Pairing

The pairing of schools has been developed in a unique way for Denver because of the court's desire to implement a suggestion first put forward by Art Branscombe, educational writer for The Denver Post. Under this suggestion, some schools are paired classroom by classroom.

The students will spend a minimum of half of their time in their paired schools, at least through the lunch hour. The pairs developed in this plan are such that either of the following procedures could be followed.

A. Students in a classroom are paired with a classroom in another school, one classroom predominantly Anglo, the other predominantly minority. These two classrooms exist as a unit. Each classroom could be divided in half and half reassigned to the other school for the entire year. Or, the students in each classroom could make their own provisions for how students would be exchanged between schools. The same students might not necessarily go each day. The mechanics of the exchange or pairing would be that one-half of the children in a classroom arrive at their home school, or at convenient bus pick up points, at the beginning of their school day for busing to their paired school. Sometime after lunch these children are returned to their home school where they engage in appropriate educational activities. Buses exchanging pupils would leave the paired

schools at the same time. During the interval when only half a class is present teachers would be able to continue teaching the smaller group. If the time at which students are returned to their home school is staggered and rotated, one bus should be able to make two runs or perhaps three and then be available for close of school bus runs. I think part-time pairing is an idea worth trying. If it is too cumbersome or unworkable, permanent reassignments can be made between the same paired schools.

B. The School Department has submitted to the court a procedure for pairing schools for grades 4, 5 and 6, which may be the most effective procedure for pairing classrooms. Entire classrooms would be bused between two schools. For example, the sixth grade in a minority school would be bused to an Anglo school on even numbered days of the month and vice versa on odd numbered days. Either a fifth grade or a different sixth grade would be traveling in the opposite direction. Classrooms would of course be integrated upon arrival at their paired classroom destination. Moving entire

classrooms has many advantages. First, the children can be accompanied on the gus by their teacher. Secondly, the two teachers, one from the minority school, one from the Anglo school, will be together so that programs, activities and integrative experiences can be planned and discussed. Thirdly, the two teachers, usually one experienced with teaching Anglo children and one experienced with teaching minority children can help each other in developing rapport with children. One disadvantage is that the number of children bused would be somewhat increased since minority children in an Anglo school would also be bused and vice versa, but the number of such children is small. Furthermore, the number of buses needed would only be increased if, by including the minority group on a bus run between schools, an additional bus would be required. In some instances two sixth grades or two first grades one day might occupy the classrooms of two fifth grades or two second grades on another day, but in larger schools that would usually not be necessary. A few of the schools have excess capacity so

that some rooms would be unoccupied when a classroom went to the paired school. This arrangement may be especially effective where open schools exist. Further, the School Department has indicated its desire to develop enrichment centers. Special equipment and facilities can be placed in one school and serve both paired schools, or some kinds put in one school and different facilities in another. Staggered hours could allow buses to make more than one run between paired schools. When whole classrooms are exchanged there would be more flexibility as to when buses leave from paired schools to exchange classrooms.

In almost all cases children attending paired schools can walk to school. Ash Grove involves some busing inside the attendance zones. The time involved in busing between paired schools is probably not over twenty minutes.

In most of the schools paired by classrooms there are very few Anglos in minority schools and few minorities in Anglo schools. There are a few exceptions, for example, Lincoln and Eagleton. In these schools it might be more

desirable to use method A for pairing which involves only half a class. At least that would reduce the amount of busing because only the minorities would need to be bused. I believe that busing whole classrooms is better and the amount of extra busing involved is insignificant.

ADDITIONAL RECOMMENDATIONS

Zone Changes

It may be desirable to adjust some school district attendance zone lines to conform to existing boundaries. The School Board has the authority to assign students to school and must exercise that responsibility. The Court should allow it to make adjustments in student assignments consistent with the overall procedures of the Court's requirements.

In some instances it is obvious that a boundary change would not alter the overall assignment procedure. An example of this would be the boundary between Moore and Bromwell. If the School Department wishes to move such grid zone

lines to existing zone lines, either to adjust school enrollments or for the convenience of students, I recommend that they be authorized to do so.

Some zone lines determine whether a student is in a paired zone, a naturally desegregated zone or a zone receiving minority students. Such zone lines may be regarded as relatively more fixed, but they are not fixed and unchangeable. Eventually the School Board must assume the responsibility of school assignments. I recommend that while the Court maintains jurisdiction changes of this latter kind be by permission of the Court.

It is not intended to have students cross Valley Highway. The zone lines should be adjusted to the Highway whenever that is possible.

It may also be desirable to alter the zones along Cherry Creek Highway. The southern boundary of Moore may be established at First Avenue. The northern boundary of Knight may be Cherry Creek Highway. Those students north of Cherry Creek Highway that are assigned to Knight by grid may be rezoned to Steck or Carson. If there are other similar

needed changes, the School Department should notify the Court so that they can be authorized.

Schools Paired by Classrooms, analysis follows on the next six pages

SCHOOLS PAIRED BY CLASSROOMS

SCHOOLS AND CAPACITIES (1-6)

	ESTIMATED ENROLLMENTS		SUGGESTED NUMBER OF CLASSROOMS
	Minority	Anglo	
Mitchell - Force 840 690			
Mitchell	370	5	16 classrooms
Force	85	411	16 classrooms
Steele - Crofton 480 240			
Steele	28	179	8 classrooms
Crofton	190	11	8 classrooms
Knight - Barrett 570 390			
Knight	15	195	8 classrooms
Barrett	167	4	8 classrooms

SCHOOLS PAIRED BY CLASSROOMS

SCHOOLS AND CAPACITIES (1-6)

	ESTIMATED ENROLLMENTS		SUGGESTED NUMBER OF CLASSROOMS
	Minority	Anglo	
Asbury - Whittier			
420 510			
Asbury	27	284	10 classrooms
Whittier	232	8	10 classrooms
University Park - Columbine			
840 945			
University Park	28	406	14 classrooms
Columbine	321	21	14 classrooms
Washington Park - Stedman			
480 390			
Washington Park	15	349	12 classrooms
Stedman	263	7	12 classrooms

SCHOOLS PAIRED BY CLASSROOMS

SCHOOLS AND CAPACITIES (1-6)

	ESTIMATED ENROLLMENTS		SUGGESTED NUMBER OF CLASSROOMS
	Minority	Anglo	
Eagleton - Doull 424 870			
Eagleton	311	114	17 classrooms
Doull	50	450	17 classrooms
Bryant - Webster - Gust			
Bryant-Webster	398	84	16 classrooms
Gust	83	447	16 classrooms
Dennison - Fairview, Traylor, Greenlee 480 397 600 735			
Greenlee	271	22	12 classrooms
Dennison	26	251	9 classrooms
Fairview	370	27	15 classrooms
Traylor	43	514	18 classrooms*

* 6 classrooms with Fairview, 12 with Greenlee

SCHOOLS PAIRED BY CLASSROOMS

SCHOOLS AND CAPACITIES (1-6)

	ESTIMATED ENROLLMENTS		SUGGESTED NUMBER OF CLASSROOMS
	Minority	Anglo	
Johnson - Gilpin			
630 630			
Johnson	56	375	15 classrooms
Gilpin	352	11	15 classrooms
Hallett - Cory - Ashgrove			
540 540 720			
Ashgrove	26	343	12 classrooms
Cory	16	143	6 classrooms
Hallett	450	11	18 classrooms
Harrington - Wyatt - Ellis			
450 300 750			
Wyatt	157	4	7 classrooms
Ellis	43	609	22 classrooms
Harrington	359	18	15 classrooms

SCHOOLS PAIRED BY CLASSROOMS

SCHOOLS AND CAPACITIES (1-6)

	ESTIMATED ENROLLMENTS		SUGGESTED NUMBER OF CLASSROOMS
	Minority	Anglo	
Smith - Fallis - McMeen			
885 300 690			
Fallis	52	264	10 classrooms
McMeen	48	410	15 classrooms
Smith	596	13	25 classrooms
Alcott - Smedley			
480 480			
Alcott	101	280	13 classrooms
Smedley	319	96	13 classrooms
Fairmont - Lincoln			
690 390			
Fairmont	314	86	13 classrooms
Lincoln	118	249	13 classrooms

SCHOOLS PAIRED BY CLASSROOMS

SCHOOLS AND CAPACITIES (1-6)

	ESTIMATED ENROLLMENTS		SUGGESTED NUMBER OF CLASSROOMS
	Minority	Anglo	
Remington - Berkeley 340 270			
Remington	205	76	9 classrooms
Berkeley	53	194	9 classrooms

Alcott - Smedley, Fairmont - Lincoln and Remington - Berkeley might use alternate assignment procedures as suggested in the preliminary plan presented by the Court Consultant.

Totals

Minority in Anglo schools	632
Anglos in Minority schools	830
Minority in Minority schools	4,807
Anglos in Anglo schools	5,699
Minority Schools	5,637
Anglo Schools	6,331
Anglos	6,529
Minority	5,439
55 % Anglo	11,968

SCHOOLS INTEGRATED WITH SHORT BUSING*

SCHOOL PLUS CAPACITY ESTIMATE		MINORITY	ANGLO	TOTAL	%
Stevens (285)	Main attendance area	25	169		
	Satellite E 1	90	1		
	Total	115	170	285	60%
Bromwell (200)	Main attendance area	2	97		
	Satellite E 2	68	16		
	Total	70	113	183	62%
Teller (370)	Main attendance area	50	204		
	Mitchell Grid	120	0		
	Total	170	204	374	55%

* Schools Integrated with short busing, continued next four pages

SCHOOLS INTEGRATED WITH SHORT BUSING

SCHOOL PLUS CAPACITY ESTIMATE		MINORITY	ANGLO	TOTAL	%
Steck (400)	Main attendance area	17	179		
	Ash Grove	-	36		
	Satellite E 3	150	13	395	58%
	Total	167	228		
Ebert (350)	Main attendance area	150	0		
	Air base	-	190		
	Total	150	190	340	56%
Palmer (340)	Main attendance area	23	127		
	Ash Grove	-	45		
	Satellite G 1	134	13		
	Total	157	185	342	54%

SCHOOLS INTEGRATED WITH SHORT BUSING

SCHOOL PLUS CAPACITY ESTIMATE		MINORITY	ANGLO	TOTAL	%
Montclair (510)	Main attendance area	48	227		
	Ash Grove	-	53		
	Satellite E 7	170	5		
	Total	218	285	503	57%
Whiteman (460)	Main attendance area	20	87		
	Ash Grove		163		
	Satellite E 5	69	3		
	Air base	106	-		
	Total	195	253	448	56%
Ellsworth (200)	Main attendance area	8	79		
	Ash Grove	-	25		
	Satellite E 6	83	3		
	Total	91	107	198	54%

SCHOOLS INTEGRATED WITH SHORT BUSING

SCHOOL PLUS CAPACITY ESTIMATE		MINORITY	ANGLO	TOTAL	%
Carson (380)	Main attendance area	20	211		
	Satellite E 4	92	6		
	Total	112	217	329	66%
Moore (485)	Main attendance area	79	241		
	Greenlee Satellite and part from G 2	130	13		
	Total	209	253	462	55%
Emerson (255)	Main attendance area	72	69		
	Greenlee Satellite	37	-		
	Air base	-	70		
	Total	109	139	248	56%

SCHOOLS INTEGRATED WITH SHORT BUSING

SCHOOL PLUS CAPACITY ESTIMATE		MINORITY	ANGLO	TOTAL	%
Wyman (460)	Main attendance area	106	91		
	Satellite G-2	113	14		
	Air base	-	128		
	Total	219	233	452	52%

SCHOOLS INTEGRATED WITH SHORT BUSING

Rosedale								
330								
Main attendance area	68	191						
Satellite Fairview	60	3						
Total	128	194	322	60%	0	0	0	
Thacker-McKinley								
270								
Main attendance area	61	192	253					
Satellite Fairview	25	0	25					
Total	86	192	278	69%	0	0	0	

Schools Integrated by Rezoning

Projected Enrollments
Page One

School and Capacity		Minority	Anglo	Total	% Anglo	Number to be Bused M	A	T
Columbian	360	191	161	352	46%	0	0	0
Beach Court	360	188	152	340	45%	0	0	0
Brown	450	233	213	446	48%	0	0	0
Edison	480	256	223	479	47%	59	35	94
Ashland	640	355	271	626	43%	7	63	70
Ashley	480	252	241	493	49%	6	23	29

Schools Integrated by Rezoning

Projected Enrollments
Page Two

School and Capacity		Minority	Anglo	Total	% Anglo	Number to be Bused M	A	T
Philips	480	219	224	443	51%	0	0	0
Park Hill	930	437	466	903	52%	0	0	0
Barnum	-	144	128	272	47%	0	0	0
Monroe	-	249	174	423	41%	0	0	0
College View	460	106	178	384	46%	0	0	0
Knapp	600	260	264	524	50%	0	0	0

Schools Integrated by Rezoning

Projected Enrollments
Page Three

School and Capacity		Minority	Anglo	Total	% Anglo	Number to be Bused M	A	T
Newlon	600	235	205	440	47%	0	0	0
Westwood	735	295	193	488	40%	0	0	0
Goldrick	690	188	229	417	55%	0	0	0
Gosman	480	251	362	613	59%	150	30	180
Sherman	240	62	91	153	59%	0	0	0
Schenck	600	142	283	425	67%	0	0	0

Schools Integrated by Rezoning

Projected Enrollments
Page Four

School and Capacity		Minority	Anglo	Total	% Anglo	Number to be Bused		
						M	A	T
Valverde	540	239	265	504	53%	50	100	150
Colfax	390	110	106	206	52%	0	0	0
Cowell	450	177	133	310	43%	0	0	0
Schmitt	600	161	267	428	62%	0	0	0

ASSIGNMENTS OF MINORITY CHILDREN WHO WILL ATTEND
COLE AND MANUAL AT THE JUNIOR AND SENIOR
HIGH SCHOOL LEVELS

Schools and Capacity		Enrollments in Attendance Zone		Receives from Satellite F	Total	% A
		M	A			
Sabin	1170	35	469	375	879	53%
Kaiser	735	25	485	225	735	68%
Holm	735	35	551	150	736	75%
Samuels	735	42	619	75	736	84%
Pitts	390	10	273	100	383	71%
Bradley	810	19	589	170	778	78%

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end

ASSIGNMENTS OF MINORITY CHILDREN WHO WILL ATTEND
COLE AND MANUAL AT THE JUNIOR AND SENIOR
HIGH SCHOOL LEVELS

Schools and Capacity		Enrollments in Attendance Zone M	A	Receives from Satellite F	Total	% A
Slavens	600	24	476	100	600	79%
					4847	

SCHOOLS NOT INTEGRATED BECAUSE OF
SPECIAL PROGRAMS OR INACCESSIBILITY

Swansea - Elyria	416	155
Cheltenham	464	185
Del Pueblo	337	20
Garden Place	220	39

Junior High Schools

Junior High Schools have been desegregated by establishing new attendance zones and by defining satellite zones. There are satellites in the southern areas of the City which consist of those attendance zones which received minority students at the elementary level. Students residing in those attendance zones will attend junior high schools which were predominantly minority. There are also satellites in minority areas. Students residing in these areas are assigned to junior high schools which are predominantly Anglo. All of the zones for the junior high schools have been prepared using the grid data base. Thus a zone is defined by the grids included within it. In some instances grid zone lines nearly correspond to present attendance zone lines. The School Department may move grid zone lines to present attendance zone lines so long as there is no substantial change in the resulting number of students residing within the area. The School Department should be directed to make adjustments in the satellites in minority neighborhoods so that

insofar as possible students already being bused to predominantly Anglo junior high schools will continue to attend the same schools. This can be done without substantial alteration in the number of minority students assigned to each school. At the junior high school level two miles is a reasonable walking distance under ordinary circumstances, although it is a long walk. When students are reassigned so that they reside within easy walking distance of one school, say less than a mile, for example, but their reassigned school is perhaps one and one-half to two miles away; then people understandably feel unfairly treated. Such students should be provided with transportation. I recommend: First that transportation be provided for all students residing more than two miles from their assigned school, and second, that transportation be provided for all students within a mile of one school who are assigned to a school more than a mile and a half from their home and in all instances where the reassignment has created a hardship in reaching the new school assignment.

I have assigned the area south of Lowry Air Base to the Byers-Baker attendance area, but the School Department may

prefer to assign those students to Hill. That would enable all of the students in the Byers-Baker attendance zone to attend Baker. If the School Department wishes to use both the Byers and the Baker school they will have to establish zones within the combined attendance zone which result in enrollments at each school so that each school enrolls substantially the same percentage of minority students.

When Cole opens in September, 1974, it will no longer be a minority junior high school. Its faculty should look like any other faculty in any other junior high school. Not only is this important to the image of Cole, but also is it important that faculty experienced in teaching minority children be available to all the junior high schools in the city. They provide the nucleus for helping other teachers largely unfamiliar with the needs of minority shildren. I am sure the School Department is aware of this problem and will take the needed appropriate steps, but the Court may want to request that the School Department submit their plans for faculty changes.

Projected Enrollment: next three pages

PROJECTED ENROLLMENT - JUNIOR HIGH SCHOOLS

School and Capacity			Minority	Anglo	Total
Byers-Baker	2195	Main Attendance Area	562	585	
		Area South of Air Force Base	37	169	
		Total	599	754	1353
Grant	810	Main Attendance Area	88	358	
		Satellite	231	5	
			319	363	682
Hamilton	1560	Main Attendance Area	32	421	
		Satellite	240	17	
			272	438	710
Hill	1485	Main Attendance Area	91	746	
		Satellite	424	13	
			515	759	1274
Cole	1725	Main Attendance Area	655	8	
		Satellite	44	766	
			699	774	1473

PROJECTED ENROLLMENT - JUNIOR HIGH SCHOOLS

School and Capacity			Minority	Anglo	Total
Kennedy (Henry)	1600	Main Attendance Area	45	800	
		Satellite	335	64	
			380	864	1244
Kepner	1710	Main Attendance Area	863	890	1753
Kunsmiller	1815	Main Attendance Area	184	873	
		Satellite	208	10	
			392	883	1275
Lake	1380	Main Attendance Area	477	405	882
Mann	1155	Main Attendance Area	494	296	
		Satellite	17	244	
			511	540	1051
Merrill	1455	Main Attendance Area	23	585	
		Satellite	397	21	
			420	606	1026

PROJECTED ENROLLMENT - JUNIOR HIGH SCHOOLS

School and Capacity			Minority	Anglo	Total
Morey	1200	Main Attendance Area	620	249	
		Satellite	12	336	
			632	585	1217
Place	1230	Main Attendance Area	49	787	
		Satellite	216	7	
			265	794	1059
Rishel	1230	Main Attendance Area	631	624	1255
Skinner	1185	Main Attendance Area	617	613	1230
Smiley	1635	Main Attendance Area	668	426	
		Montbello	297	215	
			965	641	1606
Gove	790	Main Attendance Area	215	272	
		Satellite	13	341	
			228	613	841

Desegregation of High Schools

The grid map has been used to develop new attendance zones for high schools in Denver. Large numbers of students will continue to attend the high school they now attend. There are 18,000 students enrolled in high school. Some 12,000 of these will be continuing on next year. Of this 12,000 between 2,500 and 3,000 will be assigned to a different high school.

Two satellites are in Anglo areas, one assigned to Manual High School and one assigned to East. One of these satellites is in an area that received one-way bused students during the elementary years. The other is a large area in the East and East Central part of the city that is assigned to Manual High School, the school that is presently all minority. There are satellites in minority neighborhoods for South, George Washington, Kennedy and Jefferson. Sixteen hundred minority students (not counting Montbello) will go to predominantly Anglo high schools. Of these 1,600, approximately 700 are already attending these schools.

Considerable attention has been given to the problem of integrating Manual High School. There has been extensive discussion and study of the various procedures which might be followed. Some of the Denver teachers and administrators believe the community can best be served by maintaining Manual as a high school offering special programs which might attract students on a city-wide basis. Others feel (the Manual teachers themselves are exactly evenly divided on this issue) that the school can only be and should be integrated by assigning white students to the school. Manual High School is to be congratulated for the variety of innovated programs that it has developed, but I believe the students and community can best be served if all high schools offer the kinds and varieties of programs now available at Manual. An attendance zone has been developed for Manual. With the assignment of students to Manual as herein proposed there will no longer be any black high school in the city. It is my recommendation that the school department take the necessary steps to make Manual a

comprehensive high school equal in quality and program to all the other high schools in the city. The special programs at Manual, including what are sometimes called "alternate learning projects", should in part be continued at Manual, but similar programs should also be made available in all of the city's high schools.

Desegregation of Faculty

The faculty now at Manual are those experienced in teaching the minority black students. With desegregated high schools, such teachers should be with minority students in all of the schools. In September, 1974, the faculties in each of the high schools should be fairly representive [sic] cross section of the entire high school staff. The School Department should give assurances to the Court that they intend to accomplish this, or they should be directed by the Court to present their plans for faculty.

High School Transportation

Transportation should be provided for all high school students who are assigned to schools more than three miles

from their home.

High School Zones, Estimated Enrollments,
next two pages

HIGH SCHOOL ZONES

Estimated School Enrollments

School and Capacity			Minority	Anglo	Total	% Anglo
East - Manual	3960	Main Attendance Area	1273	1340	2613	
		Satellite	20	300	320	
			1293	1640	2933	56%
East Manual Sub-zones	East	Main Attendance Area	755	650	1405	
		Satellite	20	300	320	
			775	950	1725	55%
Manual		Main Attendance Area	457	11	468	
		Satellite	61	679	740	
			518	690	1208	57%
North	2430	Main Attendance Area	989	1021	2010	51%
West	2100	Main Attendance Area	642	549	1191	46%
George Washington	2520	Main Attendance Area	108	1412	1520	
		Satellite	650	29	679	
			758	1441	2199	65%

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HIGH SCHOOL ZONES

Estimated School Enrollments

School and Capacity			Minority	Anglo	Total	% Anglo
South	2460	Main Attendance Area	98	1260	1358	
		Satellite	433	58	491	
			531	1318	1849	71%
Abraham Lincoln	2460	Main Attendance Area	409	1974	2383	82%
John F. Kennedy	1622	Main Attendance Area	236	1091	1327	
		Satellite	341	38	379	
			577	1129	1706	67%
Thomas Jefferson	2130	Main Attendance Area	51	1297	1348	
		Satellite	186	9	195	
		Montbello	169	115	284	
		Total	406	1421	1827	78%
		OVERALL TOTAL.....	5605	10493	16098	
Computer Count of Total Students			5907	10479	16386	
Actual Total Present Enrollment September 1973			6353	12007	18360	65%

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Zone Changes at the Junior and Senior High Schools

The School Department has filed some objections to the zones at the junior and senior high school levels. Projected enrollments probably fall short of actual enrollments. The zones should be viewed as suggestive, not definitive. If the School Department has different pre-ferred zones, they should be free to adopt them just so long as they meet the overall requirements of the court that all schools be within the range of 40% to 70% Anglo. The projected enrollments for Gove and Morey are pressing the capacities of those buildings. Some of those students could be temporarily diverted to Hill or Cole pending completion of the new Gove. When the new Gove is completed, adjustments should be made in Smiley, Morey, Gove, Cole, and Hill so that none exceeds 50% minority. If they wish to make adjustments for the coming year, they should be free to do so.

Transportation

There is no better way to assure parental dismay with a desegregation plan than to have an unreasonable and un-

workable transportation network. Bus failures, off-schedule buses, excessively long bus rides obviously create citizen discontent which may be misdirected at the Court rather than at the inefficiency of the transportation system. Efficient transportation systems cost more money and require more school buses. One can save transportation expenses by staggering the opening and closing hours of schools and by running tight schedules without back-up buses but obviously such practices can create parental discontent if there is much deviation from normal opening and closing hours or buses fail to arrive. At the junior and senior high school level buses need to be provided so that students can participate in after-school activities without being penalized.

If the School Board is not willing to offer assurances to the Court that they will take their responsibility of providing an effective and efficient transportation system, I recommend that the School Department be directed to submit to the Court its transportation plans in sufficient detail that they can be evaluated by transportation specialists.

The Court could then request the General Assistance Center at the University of Northern Colorado to have an evaluation made of the proposed transportation. This should not delay in any way the implementation of the Court's Order since the School Department will not defer its procurement of additional buses pending approval of its transportation plans. I presume the School Department already knows how many additional buses they need both to do the task right and to do it ineptly.

April 8, 1974

Dear Judge Doyle:

There are one or two details that were not attended to prior to my submitting my report to you.

1. There is an error on page 6. Force should read 85-411.
2. I neglected to adjust the enrollments in Morey and Gove. I recommend that until the new Gove is completed some of the Gove satellite be diverted to Cole. If 150 students were so diverted and the boundary be-

tween Gove and Morey adjusted, all of the junior high schools will have appropriate enrollments. If the school department feels that we are putting too many students into Cole they could also use some of Hill and temporarily assign some students, Anglo and minority, from Cole to Hill.

3. I am somewhat concerned that I have over enrolled the schools that receive one-way bused children in the southern part of the city. It is a problem with a simple solution. There are a number of under enrolled nearby schools: University Park, Doull and others. Excess students, Anglo and their bused in associates, can be diverted to one of the other schools but would not participate in the pairing. The students that would go to different schools would be the ones already riding buses.

Sincerely,
John A. Finger, Jr.

Modifications
to
Alleviate Overcrowding in Certain
Junior High Schools

Defendants have objected to overcrowded conditions in the following schools:

Rishil	Skinner
Kepner	Morey

The following changes may be made to alleviate unnecessary overcrowding:

1) Grid #13 West #5 North, containing 34 minorities and 14 Anglos, will attend Kepner rather than Rishil.

2) Grid #12 West #1 South, containing 28 minorities and 17 Anglos, will attend Kepner rather than Rishil.

3) Grid #14 West #6 North, containing 96 minorities and 16 Anglos, will attend Lake rather than Kepner.

4) Grid #12 West #5 South, containing 14 minorities and 31 Anglos, will attend Kunsmiller rather than Kepner.

5) Grid #13 West #5 South, containing 25 minorities and 49 Anglos, will attend Kunsmiller rather than Kepner.

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The above changes will effectuate the following results:

	M		A		T	Anglo %
Rishil	631		624		1255	
1230	-34	(to Kepner)	-14	(to Kepner)	-48	51%
	597		610		1207	
Kepner	863		890		1753	
1710	-96	(to Lake)	-16	(to Lake)	-112	
	767		874		1641	
	+62	(from Kepner)	+31	(from Kepner)	+93	
	829		905		1734	51%
	-39	(to Kunsmiller)	-80	(to Kunsmiller)	-119	
	790		825		1615	

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ORDER

Pursuant to Rules 59 and 60 of the Federal Rules of Civil Procedure, the court does hereby open the judgment herein for the purpose of amending a finding and conclusion as follows:

Paragraph 3-F of the Decree is modified to read as follows:

F. Defendants have the option of establishing an alternate program of vocational courses either at Manual or at other premises to meet specific needs for such courses, provided, however, that if such alternate programs of vocational courses are carried out at Manual, the overall minority enrollment for Manual High School plus any alternate programs on the premises is not to exceed 44%.

In further clarification and to remove any doubt, it is further ordered that that part of the court's opinion pertaining to the operation of the East-Manual complex is hereby adopted; defendants are directed to carry out fully this program for conducting the East and Manual High Schools on a campus basis.

This is to be regarded as an essential and highly important part of the desegregation programs at East High School and Manual High School.

The order opening the judgment is for the above purposes only, and the Clerk is directed to enter judgment in accordance with the above amendments.

WILFRED KEYES et al.,

Plaintiffs.

versus

SCHOOL DISTRICT NO. 1, DENVER, COLORADO et al., Defendants,

Congress of Hispanic Educators et al.,

Intervenors.

Civil Action No. C-1499

UNITED STATES DISTRICT COURT,
D. COLORADO

December 11, 1973

MEMORANDUM OPINION AND ORDER

WILLIAM E. DOYLE, Circuit Judge.

This case was previously tried in 1969-70. There has been a succession of hearings and finally a trial. The various opinions show the course of the proceedings. These appear in 303 F. Supp. 279 (D.C. Colo. 1969) (the preliminary injunction); 303 F. Supp. 289 (D.C. Colo. 1969) (supplemental findings in the preliminary injunction matter); 313 F. Supp. 61 (D.C. Colo. 1970) (judgment entered for plaintiffs on the first claim and in favor of defendants on all but one count of the second claim; this was trial on the merits); 313 F. Supp. 90 (D.C. Colo. 1970) (opinion issued on the remedy on May 21, 1970). Final judgment was entered immediately following the issuance of the last opinion. Implementation orders were subsequently entered, the final one having been entered in May 1971. The Court of Appeals affirmed in part, reversed in part and remanded, 445 F.2d 990 (10th Cir. 1971). Subsequently the Supreme Court of the United States remanded the case to this court for further proceedings, 413 U.S.

189, 93 S. Ct. 2686, 37 L. Ed. 2d 548; a hearing has now been held in accordance with the Supreme Court's mandate.

The essential and significant holding of the Supreme Court defined anew de jure segregation, ruling that the finding of intentionally segregative School Board action in the Park Hill section of Denver created a prima facie case of segregative purpose or design on the part of the Board of Education and shifted the burden of proof to the School Board to prove that other segregated schools within the system did not become so as a result of intentional action having for its purpose the creation of conditions of segregation. The primarily embattled part of the case at each level was the conduct of the School Board in the Park Hill area and the immediately adjacent sectors. The Supreme Court reexamined the facts and approved the conclusion that conduct here during the 1960's constituted de jure segregation.[1]

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1. The holding of this court had been that the remainder of the segregated schools became so as a result of neighborhood patterns rather than state ac-

The Supreme Court regarded as error the requiring of plaintiffs in a school case such as the one at bar to offer proof that the segregation in each and every instance and in each and every school was the product of official action. Proof of de jure segregation in one area "creates a presumption that other segregated schooling within the system is not adventitious. It establishes, in other words, a prima facie case of unlawful segregative design on the part of school authorities * * *," and continuing the Court further said:

> [A]nd shifts to those authorities the burden of proving that other segregated schools within the system are not also the result of intentionally segregative actions. This is true even if it is determined that different areas of the school district should be viewed independently of each other because,

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tion, that is to say, state law. This was disapproved by the Supreme Court and a new standard was pronounced governing the de facto-de jure concepts.

> even in that situation, there is high probability that where school authorities have effectuated an intentionally segregative policy in a meaningful portion of the school system, similar impermissible considerations have motivated their actions in other areas of the system. We emphasize that the differentiating factor between de jure segregation and so-called de facto segregation to which we referred in Swann is purpose or intent to segregate.

413 U.S. at 207, 93 S. Ct. at 2697.

In its mandate the Supreme Court directed the following:

> In summary, the District Court on remand, first, will afford respondent School Board the opportunity to prove its contention that the Park Hill area is a separate, identifiable and unrelated section of the school district that should be treated as isolated from the rest of the district. If respondent School Board fails to prove that contention, the District Court,

> second, will determine whether respondent School Board's conduct over almost a decade after 1960 in carrying out a policy of deliberate racial segregation in the Park Hill schools constitutes the entire school system a dual school system. If the District Court determines that the Denver school system is a dual school system, respondent School Board has the affirmative duty to desegregate the entire system "root and branch." Green v. County School Board, supra, 391 U.S. 430 at 438, 88 S.Ct. 1689 at 1694, 20 L.Ed.2d 716.

413 U.S. at 213, 93 S.Ct. at 2700.

The Supreme Court then went on to say that if it was determined by a consideration of issues one and two just mentioned that the school system was not a dual school system, this court should afford the School Board an opportunity to rebut petitioner's prima facie case of intentional segregation in the core city schools raised by the finding of intentional segregation in the Park Hill schools. The Court said that the Board

would have the burden of proving that its policies with respect to the school site location, school size, school renovation and additions, school attendance zones, standard assignment and transfer objections, mobile classroom units, transportation of students, assignment of faculty and staff, considered together and premised on the Board's so-called neighborhood school concept, either were not for the purpose of creating or maintaining segregation or, in the alternative, were not factors in causing segregation in the segregated schools.

We have heard evidence bearing on issues one and two quoted above.[2] In view of the conclusion which we reach it is unnecessary to consider issue three, for hearing on this issue is prescribed by the Supreme Corut if and only if it is determined from a resolution of issues one and two that the system is not a dual system.

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2. The parties recognized that a hearing on issue three would be unnecessary if a dual school system were found as a result of the hearing on issues one and two.

Some preliminary observations and appraisals will clarify our conclusions. First, we consider the question whether Park Hill is a separate, identifiable and unerlated section of the school district which is to be treated as isolated from the rest of the district. The School Board has not succeeded in establishing that it is separate. Indeed, it admits that there is no geographic separation of Park Hill from the remainder of the Denver school district. Since this has been conceded there is no necessity for discussing it further.

Next, we consider whether the School Board's conduct during the decade from 1960 to 1969 in carrying out a policy deliberate racial segregation in the Park Hill schools constituted the entire school system a dual system. In addition to their evidence of geographic contiguousness, plaintiffs offered expert testimony to establish that the Park Hill area was not isolated from the district in any non-geographic sense. This evidence established that the Park Hill schools received the identical administrative services provided to the other schools, and,

in addition, that there are no different faculty services, curricular and structural services, building services or financial services provided in Park Hill. In short, it was conclusively shown that there were no non-geographic grounds having even a tendency to show that the Park Hill schools were independent, separate or isolated.

Similarly, plaintiffs' evidence established that the Park Hill area is not treated differently from the surrounding areas with respect to the provision of fire and police protection, water supplies and sewerage. In terms of social characteristics and spatial relationships, Park Hill was shown to closely resemble the residential areas adjacent to it to the south and west.

Plaintiffs' evidence established that racial segregation in Park Hill has substantial effects on the schools outside the area. This, of course, was settled in earlier decisions in this case, and is additionally supported by the presumption enunciated in Mr. Justice Brennan's opinion for the Supreme Court. The essential interplay between intentional

segregation in one area and the condition in other areas was noted. It was recognized that concentration of minority groups in one area will of necessity promote or maintain Anglo concentration in others. On this the Court said:

> In short, common sense dictates the conclusion that racially inspired school board actions have an impact beyond the particular schools that are the subject of those actions. This is not to say, of course, that there can never be a case in which the geographical structure of or the natural boundaries within a school district may have the effect of dividing the district into separate, identifiable and unrelated units. Such a determination is essentially a question of fact to be resolved by the trial court in the first instance, but such cases must be rare. In the absence of such a determination, proof of state-imposed segregation in a substantial portion of the district will suffice to support a finding by the trial court of the

> existence of a dual system. Of course, where that finding is made, as in cases involving statutory dual systems, the school authorities have an affirmative duty "to effectuate a transition to a racially non-discriminatory school system." [Brown v. Bd. of Ed.] Brown II, supra, 394 U.S. 294, at 301 [sic], 75 S.Ct. 753, at 756, 99 L.Ed. 1083.

413 U.S. at 203, 93 S.Ct. at 2695. The defendants have nevertheless contended that these issues are proper for retrial here. We disagree, but we have received evidence which has been tendered in an effort to refute the above objections.

We have fully considered all of this evidence presented by defendants, both that offered in this hearing and all evidence of record from previous proceedings in this case. Insofar as that evidence was offered to support defendants' contention that the Denver school district is not a dual system, we conclude that it is merely conclusory and is lacking in substance. The intended thrust of that evidence has been that

segregated conditions in individual schools outside the Park Hill area are wholly the product of external factors such as demographic trends and housing patterns, and are in no way the product of any acts or omissions by defendants. We are not persuaded by the evidence presented, nor have defendants succeeded in dispelling the presumption that the segregative intent of the School Board was clearly evidenced by its actions in Park Hill permeating the entire district. The affirmative evidence is to the contrary, that defendants' actions in Park Hill are reflective of its attitude toward the school system generally.

The Supreme Court's viewpoint based on the record before it is that the Denver school system is a dual system. There can be no doubt as to its view of the case in the absence of new and cogent evidence. The Court has provided a new and realistic approach to the old de jure-de facto concept -- a concept which has been vague and impossible to apply. Under the Court's definition it cannot be argued that within a unified school district such as that at bar there can exist con-

scious and knowing segregation in one area and innocent segregation in another. The conclusion is therefore inescapable that the Denver system is a dual system within the Supreme Court's definitions. In accordance with the evidence presented and with the mandate given to us by the Supreme Court, we so conclude.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

United States Constitution

Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * *

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

THE EQUAL EDUCATIONAL OPPORTUNITIES
ACT OF 1974, 88 STAT. 514
20 U.S.C. (SUPP.)

§ 1701. Congressional declaration of policy

(a) The Congress declares it to be the policy of the United States that--

(1) all children enrolled in public schools are entitled to equal educational opportunity without regard to race, color, sex, or national origin; and

(2) the neighborhood is the appropriate basis for determining public school assignments.

(b) In order to carry out this policy, it is the purpose of this subchapter to specify appropriate remedies for the orderly removal of the vestiges of the dual school system.

§ 1702. Congressional findings, necessity for Congress to specify appropriate remedies for elimination of dual school systems without affecting judicial enforcement of fifth and fourteenth amendments.

(a) The Congress finds that --

(1) the maintenance of dual school systems in which students are assigned to schools solely on the basis of race, color, sex, or national origin denies to those students the equal protection of the laws guaranteed by the fourteenth amendment;

(2) for the purpose of abolishing dual school systems and eliminating the vestiges thereof, many local educational agencies have been required to reorganize their school systems, to reassign students, and to engage in the extensive transportation of students;

(3) the implementation of desegregation plans that require extensive

student transportation has, in many cases, required local educational agencies to expend large amount of funds, thereby depleting their financial resources available for the maintenance or improvement of the quality of educational facilities and instruction provided;

(4) transportation of students which creates serious risks to their health and safety, disrupts the educational process carried out with respect to such students, and impinges significantly on their educational opportunity, is excessive;

(5) the risks and harms created by excessive transportation are particularly great for children enrolled in the first six grades; and

(6) the guidelines provided by the courts for fashioning remedies to dismantle dual school systems have been, as the Supreme Court of the

United States has said, "incomplete and imperfect," and have not established, a clear, rational, and uniform standard for determining the extent to which a local educational agency is required to reassign and transport its students in order to eliminate the vestiges of a dual school system.

(b) For the foregoing reasons, it is necessary and proper that the Congress, pursuant to the powers granted to it by the Constitution of the United States, specify appropriate remedies for the elimination of the vestiges of dual school systems, except that the provisions of this chapter are not intended to modify or diminish the authority of the courts of the United States to enforce fully the fifth and fourteenth amendments to the Constitution of the United States.

§ 1703. Denial of equal educational opportunity prohibited

No State shall deny equal educational opportunity to an individual on account of his or her race, color, sex, or national origin, by--

(a) the deliberate segregation by an educational agency of students on the basis of race, color, or national origin among or within schools;

(b) the failure of an educational agency which has formerly practiced such deliberate segregation to take affirmative steps, consistent with part 4 of this chapter, to remove the vestiges of a dual school system;

(c) the assignment by an educational agency of a student to a school, other than the one closest to his or her place of residence within the school district in which he or she resides, if the assignment results in a greater degree of segregation of students on the basis of race, color,

sex, or national origin among the schools of such agency than would result if such student were assigned to the school closest to his or her place of residence within the school district of such agency providing the appropriate grade level and type of education for such student;

(d) discrimination by an educational agency on the basis of race, color, or national origin in the employment, employment conditions, or assignment to schools of its faculty, or staff, except to fulfill the purpose of subsection (f) below;

(e) the transfer by an educational agency, whether voluntary or otherwise, of a student from one school to another if the purpose and effect of such transfer is to increase segregation of students on the basis of race, color, or national origin among the schools of such agency; or

(f) the failure by an educational agency to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs.

* * *

§ 1706. Civil actions by individuals denied equal educational opportunities or by Attorney General

An individual denied an equal educational opportunity, as defined by this subchapter may institute a civil action in an appropriate district court of the United States against such parties, and for such relief, as may be appropriate. The Attorney General of the United States (hereinafter in this chapter referred to as the "Attorney General"), for or in the name of the United States, may also institute such a civil action on behalf of such an individual.

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§ 1708. Jurisdiction of district courts

The appropriate district court of the United States shall have an excercise jurisdiction of proceedings instituted under section 1706 of this title.

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§ 1712. Formulating remedies; applicability

In formulating a remedy for a denial of equal educational opportunity or a denial of the equal protection of the laws, a court, department, or agency of the United States shall seek or impose only such remedies as are essential to correct particular denials of equal educational opportunity or equal protection of the laws.

TITLE VI OF THE CIVIL RIGHTS ACT
OF 1964, 78 STAT. 249, 42 U.S.C.

§ 2000d. Prohibition against exclusion from participation in, denial of benefits of, and discrimination under Federally assisted programs on ground of race, color, or national origin.

No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

§ 2000d.-1. Federal authority and financial assistance to programs or activities by way of grant, loan, or contract other than contract of insurance or guaranty; rules and regulations; approval by President; compliance with requirements; reports to congressional committees; effective date of administrative action.

Each Federal department and agency

which is empowered to extend Federal financial assistance to any program or activity, by way of grant, loan or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 2000d of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken. No such rule, regulation, or order shall become effective unless and until approved by the President. Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement, but such termination or refusal shall be limited

to the particular political entity, or part thereof, or other recipient as to whom such a finding has been made and, shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found, or (2) by any other means authorized by law: Provided, however, That no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means. In the case of any action terminating, or refusing to grant or continue, assistance because of failure to comply with a requirement imposed pursuant to this section, the head of the Federal department or agency shall file with the committees of the House and Senate having legislative jurisdiction over the program or activity involved a full written report of the circumstances and the grounds for such action. No such action shall become effective until thirty days have elapsed after the filing of such report.

§ 2000d-2. Judicial review; Administrative Procedure Act.

Any department or agency action taken pursuant to section 2000d-1 of this title shall be subject to such judicial review as may otherwise be provided by law for similar action taken by such department or agency on other grounds. In the case of action, not otherwise subject to judicial review, terminating or refusing to grant or to continue financial assistance upon a finding of failure to comply with any requirement imposed pursuant to section 2000d-1 of this title, any person aggrieved (including any State or political subdivision thereof and any agency of either) may obtain judicial review of such action in accordance with section 1009 of Title 5, and such action shall not be deemed committed to unreviewable agency discretion within the meaning of that section.

§ 2000d-3. Construction of provisions not to authorize administrative action with respect to employment practices except where primary objective of Federal financial assistance is to provide employment.

Nothing contained in this subchapter shall be construed to authorize action under this subchapter by any department or agency with respect to any employment practice of any employer, employment agency, or labor organization except where a primary objective of the Federal financial assitance is to provide employment.

§ 2000d-4. Federal authority and financial assistance to programs or activities by way of contract of insurance or guaranty.

Nothing in this subchapter shall add to or detract from any existing authority with respect to any program or activity under which Federal financial assistance is extended by way of a contract of insurance or guaranty.

§ 2000d-5. Prohibited deferral of action on applications by local educational agencies seeking federal funds for alleged noncompliance with Civil Rights Act.

The Commissioner of Education shall not defer action or order action deferred on any application by a local educational agency for funds authorized to be appropriated by this Act, by the Elementary and Secondary Education Act of 1965, by the Act of September 30, 1950 (Public Law 874, Eighty-first Congress), by the Act of September 23, 1950 (Public Law 815, Eighty-first Congress), or by the Cooperative Research Act, on the basis of alleged noncompliance with the provisions of this subchapter for more than sixty days after notice is given to such local agency of such deferral unless such local agency is given the opportunity for a hearing as provided in section 2000d-1 of this title, such hearing to be held within sixty days of such notice, unless the time for such hearing is extended by mutual consent of such

local agency and the Commissioner, and such deferral shall not continue for more than thirty days after the close of any such hearing unless there has been an express finding on the record of such hearing that such local educational agency has failed to comply with the provisions of this subchapter: Provided, That, for the purpose of determining whether a local educational agency is in compliance with this subchapter, compliance by such agency with a final order or judgment of a Federal court for the desegregation of the school or school system operated by such agency shall be deemed to be compliance with this subchapter, insofar as the matters covered in the order or judgment are concerned.

§ 2000d-6. Policy of United States as to application of nondiscrimination provisions in schools of local educational agencies--Declaration of uniform policy.

(a) It is the policy of the United States that guidelines and cri-

teria established pursuant to Title VI of the Civil Rights Act of 1964 and section 182 of the Elementary and Secondary Education Amendments of 1966 dealing with conditions of segregation by race, whether de jure or de facto, in the schools of the local educational agencies of any State shall be applied uniformly in all regions of the United States whatever the origin or cause of such segregation.

Nature of uniformity

(b) Such uniformity refers to one policy applied uniformly to de jure segregation wherever found and such other policy as may be provided pursuant to law applied uniformly to de facto segregation wherever found.

Prohibition of construction for diminution of obligation for enforcement or compliance with nondiscrimination requirements

(c) Nothing in this section shall be construed to diminish the obligation

of responsible officials to enforce or comply with such guidelines and criteria in order to eliminate discrimination in federally-assisted programs and activities as required by Title VI of the Civil Rights Act of 1964.

Additional funds

(d) It is the sense of the Congress that the Department of Justice and the Department of Health, Education, and Welfare should request such additional funds as may be necessary to apply the policy set forth in this section throughout the United States.

45 C.F.R.

PART 80 - NONDISCRIMINATION UNDER PROGRAMS RECEIVING FEDERAL ASSISTANCE THROUGH THE DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE EFFECTUATION OF TITLE VI OF THE CIVIL RIGHTS ACT OF 1964[1]

* * *

§ 80.3 Discrimination Prohibited.

(b) Specific discriminatory actions prohibited. (1) A recipient under any program to which this part applies may not, directly or through contractual or other arrangements, on ground of race, color, or national origin;

(i) Deny an individual any service, financial aid, or other benefit provided under the program;

(ii) Provide any service, financial aid, or other benefit to an individual which is different, or is provided in a different manner, from that provided to others under the program;

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1. 38 FR 17979, July 5, 1973.

(iii) Subject an individual to segregation or separate treatment in any matter related to his receipt of any service, financial aid, or other benefit under the program;

(iv) Restrict an individual in any way in the enjoyment of any advantage or privilege enjoyed by others receiving any service, financial aid, or other benefit under the program;

(v) Treat an individual differently from others in determining whether he satisfies any admission, enrollment, quota, eligibility, membership or other requirement or condition which individuals must meet in order to be provided any service, financial aid, or other benefit provided under the program;

(vi) Deny an individual an opportunity to participate in the program through the provision of services or otherwise or afford him an opportunity to do so which is different from that afforded others under the program (including the opportunity to participate in the program as an employee but only to the

extent set forth in paragraph (c) of this section).

(vii) Deny a person the opportunity to participate as a member of a planning or advisory body which is an integral part of the program.

(2) A recipient, in determining the types of services, financial aid, or other benefits, or facilities which will be provided under any such program, or the class of individuals to whom, or the situations in which, such services, financial aid, other benefits, or facilities will be provided under any such program, or the class of individuals to be afforded an opportunity to participate in any such program, may not, directly or through contractual or other arrangements, utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program as

respect individuals of a particular race, color, or national origin.

33 FED. REG. 4955 (MARCH 23, 1968)
DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

OFFICE FOR CIVIL RIGHTS

POLICIES ON ELEMENTARY AND SECONDARY SCHOOL COMPLIANCE WITH TITLE VI OF THE CIVIL RIGHTS ACT OF 1964

The Office for Civil Rights adopts revised policies by which to evaluate the compliance status of elementary and secondary schools in the United States.

These policies are based on Title VI of the Civil Rights Act of 1964, the HEW Title VI Regulation, and decisions of the Federal Courts in cases arising under the Constitution of the United States. They are issued to guide school officials, HEW staff, and the public on the application of Title VI and the Regulation as affected by current judicial precedents, to discrimination in schools on the ground of race, color, or national origin. The controlling law is Title VI, the HEW Title VI Regulation,

and the relevant decisions of the Federal Courts.

The material published here supersedes that which now appears in 45 CFR Part 181.

Peter Libassi,
Director,
Office for Civil Rights

March 18, 1968.

POLICIES ON ELEMENTARY AND SECONDARY SCHOOL COMPLIANCE WITH TITLE VI OF THE CIVIL RIGHTS ACT OF 1964

Subpart A--Applicability of Policies

March 1968.

SECTION 1 Purpose. This statement is issued pursuant to §§80.6(a) and 80.12(b) of the HEW Title VI Regulation to set forth (1) the policies which the laws of the United States require elementary and secondary schools and school systems to follow in order to comply with Title VI of the Civil Rights Act

of 1964 and the HEW Title VI Regulation, and (2) the procedures the Department follows in carrying out its responsibilities under Title VI and the Regulation. (Sec. 602, Civil Rights Act of 1964; 78 Stat. 252; 42 U.S.C. 2000d-1.)

SEC. 2 Title VI. Section 601 of the Civil Rights Act of 1964 provides: "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." (Sec. 601, Civil Rights Act of 1964; 78 Stat. 252; 42 U.S.C. 2000d.)

SEC. 3 The HEW Title VI Regulation.

Section 602 of the Act directs Federal Departments which extend financial assistance to issue regulations to carry out the provisions of section 601. The HEW Title VI Regulations is published as Part 80, Title 45 of the Code of Federal Regulations.

The Regulation prohibits discriminatory action on the ground of race, color, or national origin by recipients of Federal financial assistance. Such discriminatory action includes:

(1) The denial of services;

(2) The provision of services in a different manner;

(3) Segregation in the provision of services; and

(4) Otherwise offering services and benefits in a manner which has the effect of defeating the purpose of the program with respect to particular individuals on the ground of race, color, or national origin.

The Regulation further provides, among other things, for:

(1) The submission by each recipient of Federal assistance of a written assurance of compliance with Title VI;

(2) The submission by recipients of reports and other information necessary to enable the Department to carry out its responsibilities under Title VI;

(3) The conduct of periodic com-

pliance reviews by HEW staff of the practices of recipients, and the resolution of noncompliance with Title VI through negotiation; and

(4) In the event of a recipient's refusal to correct noncompliance voluntarily, the initiation of administrative proceedings for the termination of Federal financial assistance, or the referral of the matter to the Department of Justice with a recommendation for appropriate proceedings under the laws of the United States. (Sec. 602, Civil Rights Act of 1964; 78 Stat. 252; 42 U.S.C. 2000d-1.)

SEC. 4 Assurance of compliance. The Department accepts three types of assurance of compliance with Title VI: (1) From school systems subject to a final order of a court of the United States for the desegregation of their schools, a written assurance that they will comply with the court's order; (2) from school systems eliminating a dual school structure under a voluntary desegregation plan, an HEW Form 441-B Assurance of Compliance; and (3) from

all other schools and school systems, an HEW Form 441, Assurance of Compliance. When executing HEW Form 441, a school system agrees that it will take the measures necessary to comply with Title VI and the HEW Title VI Regulation. When executing HEW Form 441-B, a school system agrees that its voluntary desegregation plan will comply with the requirements of the HEW policy statements applicable to its type of desegregation plan. (Sec. 602, Civil Rights Act of 1964; 78 Stat. 252; 42 U.S.C. 2000d-1.)

SEC. 5 Applicability of statement. This statement amends and supersedes the "Revised Statement of Policies for School Desegregation Plans under Title VI of the Civil Rights Act of 1964" issued in March 1966 and amended in December 1966 and applies to all elementary and secondary schools and school systems which receive Federal financial assistance through the Department of Health, Education, and Welfare. Subpart B states compliance policies generally applicable to school systems throughout the United States. Subpart C

states additional compliance policies applicable to school systems carrying out a voluntary desegregation plan. Subpart D states the Department's Title VI compliance procedures, and is applicable to each school or school system receiving Federal financial assistance. While these policies do not require the correction of racial imbalance resulting from private housing patters, neither the policies nor Title VI bars a school system from reducing or eliminating racial imbalance in its schools. (Sec. 602, Civil Rights Act of 1964; 78 Stat. 252; 42 U.S.C. 2000d-1.)

Subpart B--General Compliance Policies

SEC. 6 General. Under Title VI and the HEW Title VI Regulation, schools and school systems are responsible for assuring that the services, facilities, activities, and programs which they conduct or sponsor, or with which they

are affiliated, are free of discrimination on the ground of race, color, or national origin. This responsibility precludes a system from segregating students or from denying equal educational opportunities to students on the ground of race, color, or national origin. Each school system has the affirmative duty under law to take prompt and effective action to eliminate segregation or other discrimination based on race, color, or national origin, and to correct the effects of past discrimination. Correction of discrimination may require positive action based on the race, color, or national origin of students and professional staff. (Secs. 601, 602, Civil Rights Act of 1964; 78 Stat. 252; 42 U.S.C. 2000d, 2000d-1.

SEC. 7 School organization and operation. School systems are responsible for assuring that there is no segregation of students on the ground of race, color, or national origin in the organization or operation of their schools. This responsibility for elimi-

nating segregation extends to the manner in which a school system's educational programs and activities (including transportation, athletics, and extracurricular activities) are organized, school construction is planned, and students are assigned to schools; and covers such action as:

--Determining the curricula and activities available at particular schools.

--Setting the grade levels and number of students assigned to particular schools.

--Planning the location and size of new schools, and additions to or rehabilitation of existing schools.

--Establishing and maintaining school attendance zones, school feeder patterns, and school transportation patterns.

--Granting student transfers from school to school, or school system to school system.

--Assigning students to curricula, classes, and activities within a school.

(Secs. 601, 602, Civil Rights Act of

1964; 78 Stat. 252; 42 U.S.C. 2000d, 2000d-1.

SEC. 8 Equal educational opportunity. School systems are responsible for assuring that students of a particular race, color, or national origin are not denied the opportunity to obtain the education generally obtained by other students in the system. Providing equal educational opportunity does not, however, require school systems to offer an identical educational program for each student, or to fund each school, curriculum course, or activity on the same basis, if the variations in programs and funding do not deny educational opportunities to students on the ground of race, color, or national origin. (Secs. 601, 602, Civil Rights Act of 1964; 78 Stat. 252; 42 U.S.C. 2000d, 2000d-1.)

SEC. 9 Inferior educational facilities and services. Where there are students of a particular race, color, or national origin concentrated in certain schools or classes, school systems are responsible for assuring

that these students are not denied equal educational opportunities by practices which are less favorable for educational advancement than the practices at schools or classes attended primarily by students of any other race, color, or national origin. Examples of disparities between such schools and classes which may constitute a denial of equal educational opportunities include, but are not limited to:

--Comparative overcrowding of classes, facilities, and activities.

--Assignment of fewer or less qualified teachers and other professional staff.

--Provision of less adequate curricula and extracurricular activities or less adequate opportunities to take advantage of the available activities and services.

--Provision of less adequate student services (guidance and counseling, job placement, vocational training, medical services, remedial work).

--Assigning heavier teaching and other

professional assignments to school staff.

--Maintenance of higher pupil-teacher ratios or lower per pupil expenditures.

--Provision of facilities (classrooms, libraries, laboratories, cafeterias, athletic and extracurricular facilities), instructional equipment and supplies, and text books in a comparatively insufficient quantity.

--Provision of buildings, facilities, instructional equipment and supplies, and text books which, comparatively, are poorly maintained, outdated, temporary or otherwise inadequate. (Secs. 601, 602, Civil Rights Act of 1964; 78 Stat. 252; 42 U.S.C. 2000d, 2000d-1.)

SEC. 10 Professional staff.

School systems are responsible for recruiting, hiring, assigning, promoting, paying, demoting, and dismissing their professional staff without discrimination on the ground of race, color, or national origin. Where there has been

discrimination in professional staffing policies or practices, school systems are responsible for taking whatever positive action may be necessary to correct the effects of the discrimination.

If, as a result of a program for complying with Title VI, there is to be a reduction in the total professional staff of a school system, or professional staff members are to receive assignments of lower status or pay, the staff members to be released or demoted must be selected from all the school system's professional staff members without regard to race, color, or national origin and on the basis of objective and reasonable standards. In addition, in such a situation, no staff vacancy may be filled through recruitment from outside the system unless school officials first determine that none of the displaced staff members is qualified to fill the vacancy.

Professional staff refers to staff members who are responsible for the

education of students, and includes administrators, supervisors, and principals; teachers and other instructional staff; special services personnel; and such other staff members as student teachers and teacher aides. (Secs. 601, 602, Civil Rights Act of 1964; 78 Stat. 252; 42 U.S.C. 2000d, 2000d-1.)

* * *

The May 25, 1970 Memorandum
(35 Fed. Reg. 11595,
July 18, 1970)

Office for Civil Rights
IDENTIFICATION OF DISCRIMINATION AND DENIAL OF SERVICES ON THE BASIS OF NATIONAL ORIGIN

The following memorandum has been sent by the Director, Office for Civil Rights, to selected school districts with students of National Origin-Minority Groups:

Title VI of the Civil Rights Act of 1964, and the Departmental Regulation (45 CFR Part 80) promulgated thereunder, require that there be no discrimination on the basis of race, color, or national origin in the operation of any federally assisted programs.

Title VI compliance review conducted in school districts with large Spanish-surnamed student populations by the Office for Civil Rights have revealed a number of common practices which have the effect of denying equality of

educational opportunity to Spanish-surnamed pupils. Similar practices which have the effect of discrimination on the basis of national origin exist in other locations with respect to disadvantaged pupils from other national origin-minority groups, for example Chinese or Portuguese.

The purpose of this memorandum is to clarify D/HEW policy on issues concerning the responsibility of school districts to provide equal educational opportunity to national origin-minority group children deficient in English language skills. The following are some of the major areas of concern that relate to compliance with Title VI:

(1) Where inability to speak and understand the English language excludes national origin-minority group children from effective participation in the educational program offered by a school district, the district must take affirmative steps to rectify the language deficiency in order to open its in-

structional program to these students.

(2) School districts must not assign national origin-minority group students to classes for the mentally retarded on the basis of criteria which essentially measure or evaluate English language skills; nor may school districts deny national origin-minority group children access to college preparatory courses on a basis directly related to the failure of the school system to inculcate English language skills.

(3) Any ability grouping or tracking system employed by the school system to deal with the special language skill needs of national origin-minority group children must be designed to meet such language skill needs as soon as possible and must not operate as an educational dead-end or permanent track.

(4) School districts have the resposibility to adequately notify national origin-minority group parents of school activities which are called to the attention of other parents. Such notice

in order to be adequate may have to be provided in a language other than English.

School districts should examine current practices which exist in their districts in order to assess compliance with the matters set forth in this mem orandum. A school district which determines that compliance problems currently exist in that district should immediately communicate in writing with the Office for Civil Rights and indicate what steps are being taken to remedy the situation. Where compliance questions arise as to the sufficiency of programs designed to meet the language skill needs of national origin-minority group children already operating in a particular area, full information regarding such programs should be provided. In the area of special language assistance, the scope of the program and the process for identifying need and the extent to which the need is fulfilled should be set forth.

School districts which receive this memorandum will be contacted shortly regarding the availability of technical assistance and will be provided with any additional information that may be needed to assist districts in achieving compliance with the law and equal educational opportunity for all children. Effective as of this date the aforementioned areas of concern will be regarded by regional Office for Civil Rights personnel as a part of their compliance responsibilities.

Dated: July 10, 1970.

[SEAL] J. STANLEY POTTINGER,

Director,

Office for Civil Rights.

DEPARTMENT OF HEALTH,
EDUCATION, AND WELFARE

Office of the Secretary
Washington, D.C., 20201

MEMORANDUM FOR CHIEF STATE SCHOOL OFFICERS

FROM: Commissioner of Education,
U.S. Office of Education

FROM: Acting Director, Office for
Civil Rights

SUBJECT: Evaluation of Voluntary Compliance Plans Designed to Eliminate Educational Practices Which Deny Non-English Language Dominant Students Equal Educational Opportunity

In furtherance of regulations issued by this Department pursuant to Title VI of the Civil Rights Act of 1964, this Department, on May 25, 1970, issued a policy statement (subsequently published at 35 Federal Register 11595) stating in part that "Where inability to speak and understand the English language excludes national-origin minority group children from effective participation in the educational program offered by a school district, the district must take affirmative steps to rectify the language deficiency in order to open its instructional program to the students." (Attachment A).

On January 21, 1974 the United States Supreme Court in Lau v. Nichols (414 U.S. 563) expressly upheld the Department regulations (as interpreted by this policy statement) prohibiting educational practices by which "students who do not understand English are effectively foreclosed from any meaningful education." (Attachment B).

Earlier this year, our offices sent letters to several State Education Agencies requesting the assistance of these agencies in the conduct of compliance reviews of specific school districts within those states. State Education Agencies were specifically requested to assist the Department in the dissemination and evaluation of compliance reports.

In order to facilitate efforts by both State Education Agencies and this Office to secure voluntary compliance with current Title VI requirements in this regard, this Office designated a Task Force to develop an outline of those educational approaches which would constitute appropriate "affirmative steps" to be taken by a non-complying school district "to open its instructional program" to students foreclosed currently from effective participation therein. That outline has been developed and is formally called, "Task Force Finding Speci-

fying Remedies Available for Eliminating Past Educational Practices Ruled Unlawful under Lau v. Nichols." (Attachment C).

This document separately discusses the types of educational approaches appropriate for elementary and secondary students and identifies approaches which are specifically geared to the differing language backgrounds and masteries of students.

School districts found to be in noncompliance with the aforementioned provisions of Title VI will be required to develop specific voluntary compliance plans to eliminate discriminatory educational practices (including the effects of past practices). Voluntary compliance plans which set forth educational strategies consistent with the approaches outlined in this document and which contain the other elements specified therein, will be accepted by this Office. School districts submitting voluntary

compliance plans to this Office which are not consistent with the outlined approaches or with other required plan elements must demonstrate affirmatively, at the time of submission, that such plans, at a minimum, will be equally effective in ensuring equal educational opportunity.

In order to provide technical assistance to those school districts that wish to develop such voluntary compliance plans, the Office of Education has set up General Assistance Centers (Type B) commonly referred to as "Lau Centers." School districts wishing to obtain technical assistance to develop such plans should be advised to contact the Lau General Assistance Center which serves their geographical area (Attachment D).

If you have any questions concerning any of the matters discussed in this memorandum, please do not hesitate to contact your Regional Office for Civil Rights for further information.

Thank you for your continuing cooperation in this important area of mutual concern.

T. H. Bell
Commissioner of Education
U. S. Office of Education

Martin H. Gerry
Acting Director
Office for Civil Rights

Attachments

DEPARTMENT OF HEALTH, EDUCATION
AND WELFARE

Office of the Secretary
Washington, D.C. 20201

OFFICE FOR CIVIL RIGHTS

TASK FORCE FINDINGS SPECIFYING REMEDIES AVAILABLE FOR ELIMINATING PAST EDUCATIONAL PRACTICES RULED UNLAWFUL UNDER LAU v. NICHOLS

SUMMER 1975

TABLE OF CONTENTS

I. Identification of Student's Primary or Home Language ...332a
II. Diagnostic/Prescriptive Approach 336a
III. Educational Program Selection.338a
IV. Required and Elective Courses.348a
V. Teacher Requirements.....351a
VI. Racial/Ethnic Isolation and/or Identifiability of Schools and Classes.....354a
VII. Notification to Parents of Students Whose Primary or Home Language is Other Than English 355a
VIII. Evaluation 356a
IX. Definition of Terms.....358a

The immediate implementation of the requirements listed within does not apply to those school districts which have had a substantial number of recent school-age Indo-Chinese immigrants whose primary or home language is other than English in the 1975-76 school year.

I. Identification of Student's Primary or Home Language.

The first step to be included in a plan submitted by a district found to be in noncompliance with Title VI under Lau is the method by which the district will identify the student's primary or home language. A student's primary or home language, for the purpose of this report, is other than English if it meets at least one of the following descriptions:

A. The student's first acquired language is other than English.
B. The language most often spoken by the student is other than English.
C. The language most often spoken in the student's home is other than English, regardless of the language spoken by the student.

These assessments (A-C, above) must be made by persons who can speak and

understand the necessary language(s). Then the district must assess the degree of linguistic function or ability of the student(s) so as to place the student(s) in one of the following categories by language.

A. Monolingual speaker of the language other than English (speaks the language other than English exclusively).
B. Predominantly speaks the language other than English (speaks mostly the language other than English, but speaks some English).
C. Bilingual (speaks both the language other than English and English with equal ease).
D. Predominantly speaks English (speaks mostly English, but some of the language other than English).

E. Monolingual speaker of English (speaks English exclusively).

In the event that the student is multilingual (is functional in more than two languages in addition to English), such assessment must be made in all the necessary languages.

In order to make the aforementioned assessments the district must, at a minimum, determine the language most often spoken in the student's home, regardless of the language spoken by the student, the language most often spoken by the student in the home and the language spoken by the student in the social setting (by observation).

These assessments must be made by persons who can speak and understand the necessary language(s). An example of the latter would be to determine by observation, the language used by the student to communicate

with peers between classes or in informal situations. These assessments must cross-validate one another (Example: student speaks Spanish at home and Spanish with classmates at lunch). Observers must estimate the frequency of use of each language spoken by the student in these situations.

In the event that the language determinations conflict (Example: student speaks Spanish at home, but English with classmates at lunch), an additional method must be employed by the district to make such a determination (for example the district may wish to employ a test of language dominance as a third criterion). In other words, two of the three criteria will cross-validate or the majority of criteria will cross-validate (Yield the same language).

Due to staff limitations and priorities, we will require a plan under Lau during this initial stage of investigation when the district has 20 or more students of the same language group identified as having a primary or home language other than English. However, a district does have an obligation to serve any student whose primary or home language is other than English.

II. Diagnostic/Prescriptive Approach

The second part of a plan must describe the diagnostic/prescriptive measures to be used to identify the nature and extent of each student's educational needs and then prescribe an educational program utilizing the most effective teaching style to satisfy the diagnosed educational needs. The determination of which teaching style(s) are to be used will be based on a careful review of both the cognitive and affective domains and should include

an assessment of the responsiveness of students to different types of cognitive learning styles and incentive motivational styles -- e.g., competitive v. cooperative learning patters. The diagnostic measures must include diagnoses of problems related to areas or subjects required of other students in the school program and prescriptive measures must serve to bring the linguistically/culturally different student(s) to the education performance level that is expected by the Local Education Agency (LEA) and State of nonminority students. A program designed for students of limited English-speaking ability must not be operated in a manner so as to solely satisfy a set of objectives divorced or isolated from those educational objectives established for students in the regular school program.

III. Educational Program Selection

In the third step the district must implement the appropriate type(s) of educational program(s) listed in this Section (III, 1-5), dependent upon the degree of linguistic proficiency of the students in question. If none seem applicable check with your Lau coordinator for further action.

1. In the case of the monolingual speaker of the language other than English (speaks the language other than English exclusively).

   A. At the Elementary and Intermediate Levels:

      Any one or combination of the following programs is acceptable.

      1. Transitional Bilingual Education Program (TBE).
      2. Bilingual/Bicultural Program.
      3. Multilingual/Multicultural Program (see definitions, page 358a).

In the case of a TBE, the district must provide predictive data which show that such student(s) are ready to make the transition into English and will succeed educationally in content areas and in the educational program(s) in which he/she is to be placed. This is necessary so the district will not prematurely place the linguistically/culturally different student who is not ready to participate effectively in an English language curriculum in the regular school program (conducted exclusively in English).

Because an ESL program does not consider the affective nor cognitive development of students in this category and time and maturation variables are different here than for students at the secondary level, and ESL program <u>is</u> <u>not</u> appropriate.

B. At the Secondary Level:
Option 1 - Such students may receive instruction in subject matter (example: math, science) in the native language(s) and receive English-as-a-Second Language (ESL) as a class component (see definitions, page 358a).

Option 2 - Such students may receive required and elective subject matter (examples: math, science, industrial arts) in the native language(s) and bridge into English while combining English with the native language as appropriate (learning English as a first language, in a natural setting).

Option 3 - Such students may receive ESL or High Intensive Language Training (HILT), (see

definition, page 358a) in English until they are fully functional in English (can operate equally successfully in school in English) then bridge into the school program for all other students.

A district may wish to utilize a TBE, Bilingual/Bicultural or Multilingual/Multicultural program in lieu of the three options presented in this section (III.1.B.). This is permissible. However, if the necessary prerequisite skills in the native language(s) have not been taught to these students, some form of compensatory education in the native language must be provided.

In any case, students in this category (III.1.B.) must receive such instruction in a manner that is expeditiously carried out so that the student in question will be able to participate to the greatest

extent possible in the regular school program as soon as possible. At no time can a program be selected in this category (III.1.B.) to place the students in situations where the method of instruction will result in a substantial delay in providing these students with the necessary English language skills needed by or required of other students at the time of graduation.

NOTE: You will generally find that students in this category are recent immigrants.

2. In the case of the predominate speaker of the language other than English (speaks mostly the language other than English, but speaks some English):

A. At the Elementary Level:
Any one or combination of

the following programs is acceptable.

1. TBE
2. Bilingual/Bicultural Program
3. Multilingual/Multicultural Program

In the case of a TBE, the district must provide predictive data which show that such student(s) are ready to make the transition into English and will educationally succeed in content areas and the educational program in which he/she is to be placed.

Since an ESL program does not consider the affective nor cognitive development of the students in this category and the time and maturation variables are different here than for students at the secondary level, an ESL program is not appropriate.

B. At the Intermediate and High School Levels:

The district must provide data relative to the student's academic achievement and identify those students who have been in the school system for less than a year. If the student(s) who have been in the school system for less than a year are achieving at grade level or better, the district is not required to provide additional educational programs. If, however, the students who have been in the school system for a year or more are underachieving (not achieving at grade level), (see definitions, page 358a the district must submit a plan to remedy the situation. This may include smaller class size, enrichment materials, etc. In either this case or the case of students who are underachieving

and have been in the school system for less than a year, the remedy must include any one or combination of the following 1) an ESL, 2) a TBE, 3) a Bilingual/Bicultural Program 4) a Multilingual/Multicultural Program. But such students may not be placed in situations where all instruction is conducted in the native language as may be prescribed for the monolingual speaker of a language other than English, if the necessary prerequisite skills in the native language have not been taught. In this case some form of compensatory education in the native language must be provided.

NOTE: You will generally find that students in this category are not recent immigrants.

3. In the case of the bilingual speaker (speaks both the lan-

guage other than English and English with equal ease) the district must provide data relative to the student(s) academic achievement.

In this case the treatment is the same at the elementary, intermiediate and secondary levels and differs only in terms of underachievers and those students achieving at grade level or better.

A. For the students in this category who are underachieving, treatment corresponds to the regular program requirements for all racially/ethnically identifiable classes or tracks composed of students who are underachieving, regardless of their language background.

B. For the students in this category who are achieving at grade level or better, the district is not required to provide additional educational programs.

4. In the case of the predominant speaker of English (speaks mostly English, but some of a language other than English) treatment for these students is the same as III, 3 above.

5. In the case of the monolingual speaker of English (speaks English exclusively) treat the same as III, 3 above.

NOTE: ESL is a necessary component of all the aforementioned programs. However, an ESL program may not be sufficient as the only program operated by a district to respond to the educational needs of all the types of students described in this document.

IV. Required and Elective Courses
In the fourth step of such plan the district must show that the required and elective courses are not designed to have a discriminatory effect.

A. Required courses. Required courses (example: American History) must not be designed to exclude pertinent minority developments which have contributed to or influenced such subjects.

B. Elective Courses and Co-curricular Activities. Where a district has been found out of compliance and operates racially/ethnically identifiable elective courses or co-curricular activities, the plan must address this area by either educationally justifying the racial/ethnic identifiability of these courses or activities, elimina-

ting them, or guaranteeing that these courses or co-curricular activities will not remain racially/ethnically identifiable.

There is a prima facie case of discrimination if courses are racially/ethnically identifiable.

Schools must develop strong incentives and encouragement for minority students to enroll in electives where minorities have not traditionally enrolled. In this regard, counselors, principals and teachers have a most important role. Title VI compliance questions are raised by any analysis of counseling practices which indicates that minorities are being advised in a manner which results in their being disproportionately channeled into certain subject areas or courses. The school district

must see that all of its students are encouraged to fully participate and take advantage of all educational benefits.

Close monitoring is necessary to evaluate to what degree minorities are in essence being discouraged from taking certain electives and encouraged to take other elective courses and insist that to eliminate discrimination and to provide equal educational opportunities, districts must take affirmative duties to see that minority students are not excluded from any elective courses and over included in others.

All newly established elective courses cannot be designed to have a discriminatory effect. This means that a district cannot, for example, initiate a

course in Spanish literature designed exclusively for Spanish-speaking students so that enrollment in that subject is designed to result in the exclusion of students whose native language is English but who could equally benefit from such a course and/or be designed to result in the removal of the minority students in question from a general literature course which should be designed to be relevant for all the students served by the district.

V. Instructional Personnel Requirements (see definitions, page 358a). Instructional personnel teaching the students in question must be linguistically/culturally familiar with the background of the students to be affected.

The student/teacher ratio for such programs should equal or be less than (fewer students per teacher) the student/teacher ratio for the district. However, we will not require corrective action by the district if the number of students in such programs are no more than five greater per teacher than the student/teacher ratio for the district.

If instructional staffing is inadequate to implement program requirements, in-service training, directly related to improving student performance is acceptable as an immediate and temporary response. Plans for providing this training must include at least the following:

1. Objectives of training (must be directly related to ultimately improving student performance)

2. Methods by which the objective(s) will be achieved
3. Method for selection of teachers to receive training
4. Names of personnel doing the training and location of training
5. Content of training
6. Evaluation design of training and performance criteria for individuals receiving the training
7. Proposed timetables

This temporary in-service training must continue until staff performance criteria has been met.

Another temporary alternative is utilizing para professional persons with the necessary language(s) and cultural background(s). Specific instructional roles of such personnel must be included in the plan. Such plan must show that this personnel will aid in

teaching and not be restricted to those areas unrelated to the teaching process (checking roll, issuing tardy cards, etc.)

In addition, the district must include a plan for securing the number of qualified teachers necessary to fully implement the instructional program. Development and training of para professionals may be an important source for the development of bilingual/bicultural teachers.

VI. Racial/Ethnic Isolation and/or Identifiability of Schools and Classes

A. Racially/Ethnically Isolated and/or Identifiable Schools - It is not educationally necessary nor legally permissable to create racially/ethnically identifiable schools in order to respond to student language

characteristics as specified in the programs described herein.

B. Racially/Ethnically Isolated and/or Identifiable Classes - The implementation of the aforementioned educational models does not justify the existence of racially/ethnically isolated or identifiable classes, per se. Since there is no conflict in this area as related to the application of the Emergency School Aid Act (ESAA) and existing Title VI regulations, standard application of those regulations is effective.

VII. Notification to Parents of Students Whose Primary or Home Language is Other Than English

A. School districts have the responsibility to effectively notify the parents of the students identified as having a

primary or home language other than English of all school activities or notices which are called to the attention of other parents. Such notice, in order to be adequate, must be provided in English and in the necessary language(s) comprehensively paralleling the exact content in English. Be aware that a literal translation may not be sufficient.

B. The district must inform all minority and nonminority parents of all aspects of the programs designed for students of limited English-speaking ability and that these programs constitute an integral part of the total school program.

VIII. Evaluation

A "Product and Process" evaluation is to be submitted in the plan.

This type of evaluation, in addition to stating the "product" (end result), must include "process evaluation" (periodic evaluation throughout the implementation stage). A description of the evaluation design is required. Timelines (target for completion of steps) is an essential component.

For the first three years, following the implementation of a plan, the district must submit to the OCR Regional Office at the close of sixty days after school starts, a "progress report" which will show the steps which have been completed. For those steps which have not been completed, a narrative from the district is necessary to explain why the targeted completion dates were not met. Another "progress report" is also due at the close of 30 days after the last day of the school year

in question.

IX. Definition of Terms:

1. Bilingual/Bicultural Program

A program which utilizes the student's native language (example: Navajo) and cultural factors in instructing, maintaining and further developing all the necessary skills in the student's native language and culture while introducing, maintaining and developing all the necessary skills in the second language and culture (example: English). The end result is a student who can function, totally, in both languages and cultures.

2. English-as-a-Second Language (ESL)

A structured language acquisi-

tion program designed to teach English to students whose native language is not English.

3. High Intensive Language Training (HILT)

   A total immersion program designed to teach students a new language.

4. Multilingual/Multicultural Program

   A program operated under the same principals as a Bilingual/ Bicultural Program (X,1) except that more than one language and culture, in addition to English language and culture is treated. The end result is a student who can function, totally, in more than two languages and cultures.

5. Transitional Bilingual Education Program (TBE)

   A program operated in the same manner as a Bilingual/ Bicultural Program, except that once the student is fully functional in the second language (English), further instruction in the native language is no longer required.

6. Underachievement

   Underachievement is defined as performance in each subject area (e.g. reading, problem solving) at one or more standard deviations below district norms as determined by some objective measures for non-ethnic/racial minority students. Mental ability scores cannot be utilized for determining grade expectancy.

7. Instructional Personnel

Persons involved in teaching activities. Such personnel includes, but is not limited to, certified, credentialized teachers, para professionals, teacher aides, parents, community volunteers, youth tutors, etc.

[Clerk's certificate omitted]

AN ACT

HOUSE BILL NO. 1295. BY REPRESENTATIVES Lucero, Valdez, Sears, Neale, Barragan, Castro, Bendelow, Boley, Brinton, Brown, Burrows, Cantrell, DeMoulin, Dick, Flanery, Frank, Gaon, Hamlin, Hayes, Hobbs, Hogan, Howe, Kirscht, Kopel, Lloyd, Lyon, McCroskey, Marks, Massari, Ore, Orten, Quinlan, Smith, Sprague, Taylor, Wayland, Webb, Wells, Arnold, Elliott, Gustafson, Knox, Kramer, Miller, and Strahle; also SENATORS Cisneros, Sandoval, Minister, Comer, Darby, Gallagher, Groff, Hatcher, Holme, Kadlecek, Kogovsek, MacManus, Massari, Cooper, DeBernard, Hughes, and Shoemaker.

CONCERNING BILINGUAL-BICULTURAL EDUCATION, AND ENACTING THE "BILINGUAL AND BICULTURAL EDUCATION ACT", AND MAKING AN APPROPRIATION THEREFOR.

Be it enacted by the General Assembly of the State of Colorado:

SECTION 1. Title 22, Colorado Revised Statutes 1973, as amended, is amended BY THE ADDITION OF A NEW ARTICLE to read:

ARTICLE 24

Bilingual and Bicultural Education

22-24-101. Short title. This article shall be known and may be cited as the "Bilingual and Bicultural Education Act."

22-24-102. Legislative declaration. (1) The general assembly hereby declares that there are substantial numbers of students in this state with linguistically different skills due to the influence of another language in their family, community, or peer group or due to their cultural environment, and that public school classes in which instruction is given only in English may be inadequate for the education of these students.

Capital letters indicate new material added to existing statutes; dashes through words indicate deletions from existing statutes and such material not part of act.

The general assembly recognizes the need to provide for programs to perfact the English language skills and cultural development of these students and finds that this could best be accomplished through bilingual and bicultural programs in grades kindergarten through third grade which provide cognitive and affective development of these students by: utilizing the linguistic skills of these students in the curriculum; providing these students with opportunities to expand their conceptual and linguistic abilities and potentials in a successful and positive manner; and developing cultural and ethnic pride and understanding among these and other students. The general assembly recognizes the need to provide for programs directed toward the achievement of the following objectives:

(a) Improved performance in comprehension, reading, writing, and speaking the English language;

(b) Improved school attendance and a reduced dropout rate;

(c) Development of a positive self-concept and attitude; and

(d) Greater parental involvement in the school programs.

(2) Therefore the policy of this state is to insure equal educational opportunity for every student and to recognize the educational needs of students with linguistically different skills. The general assembly further declares that it is the purpose of this article to provide for the establishment of bilingual and bicultural programs in the public schools in grades kindergarten through third grade and to provide for the distribution of funds to districts for the costs resulting from such programs.

22-24-103. Definitions. As used in this article, unless the context otherwise requires:

(1) "Bilingual and bicultural education teacher's aide" means a person

employed to assist the teacher in a program.

(2) "Board of cooperative services" means a board of cooperative services created pursuant to article 5 of this title.

(3) "Community bilingual and bicultural committee" or "community committee" means the district level committee consisting of parents and other persons elected for each district providing a bilingual and bicultural education program pursuant to the provisions of this article.

(4) "Community coordinator" means a person employed by the district for the purpose of promoting communication, understanding, and cooperation between the public school and the community for the effective implementation of programs initiated pursuant to this article.

(5) "Department" means the department of education.

(6) "Direct attributable additional cost" means those costs which are in-

curred due to the provision by a school district or board of cooperative services of approved programs under this article. These costs include both direct support services and direct instructional services and are in addition to the program which all children in the district would be entitled to receive and do not include indirect costs.

(7) "Director" means the person selected pursuant to the provisions of this article to be the administrative head of the unit in the department.

(8) "District" means a school district organized and existing pursuant to law but does not include a junior college district.

(9) "District director of bilingual and bicultural education" means the person appointed to direct the operation of a district's bilingual and bicultural program in which there are more than one hundred students.

(10) "Program" means the bilingual

and bicultural education program established by a district for the purpose of perfecting the English language skills and cultural development of its students which provides for effective development of its students and which provides for the cognitive and affective development of its students by: Utilizing the cultural and linguistic backgrounds of these students in the curriculum; providing these students with opportunities to expand their conceptual and linguistic abilities and potentials in a successful and positive manner; and developing cultural and ethnic pride and understanding among these and other students.

(11) "School board" means the board of education of a local school district.

(12) "State steering committee" means the state bilingual and bicultural steering committee appointed to assist the state board of education in fully and effectively implementing the provisions of this article.

(13) "Students with linguistically different skills" means students who are not able to take full advantage of present educational programs taught in English because of their language skills and who come from an environment of different customs and traditions which may include the influence of another language in their family, community, or peer group.

(14) "Supervisor" means a person appointed to supervise a district's bilingual and bicultural program in which there are less than one hundred students enrolled.

(15) "Teacher" means any person certificated pursuant to article 60 of this title employed to administer, direct, or supervise the classroom instructional program in a school in this state.

(16) "Title I or Title VII school " means a school operating a program under Title I or Title VII of the "Federal

Elementary and Secondary Education Act."

(17) "Unit" means the unit of bilingual and bicultural education within the department created pursuant to this article.

22-24-104. Cooperation as boards of cooperative services. Districts may cooperate in the carrying out of the provisions of this article, pursuant to the "Boards of Cooperative Services Act of 1965", article 5 of this title. Accordingly, as used in this article, unless the context otherwise specifically requires, "district" and "school board" include "board of cooperative services".

22-24-105. State bilingual and bicultural steering committee - creation. (1) Within fifteen days after approval of this article by the governor, there shall be created a provisional state steering committee. Said committee shall be composed of nine members, three of whom shall be appointed by the governor and who shall be

legal residents of this state, three of whom shall be appointed by the speaker of the house of representatives and who shall be members of the house of representatives, and three of whom shall be appointed by the president of the senate and who shall be members of the senate. Said steering committee shall serve for a period of two years.

(2) A regular state steering committee shall be appointed to succeed the provisional state steering committee pursuant to the provisions of this subsection (2) and subsections (2) to (7) of this section. The regular state steering committee shall be composed of the following nineteen members, all of whom shall be legal residents of this state:

(a) Fifteen members, three from each congressional district in the state, appointed by the state board of education from among nominations submitted by the provisional or regular

state steering committee pursuant to subsection (3) of this section. One of the three members from each congressional district shall be a teacher or teacher's aide involved in a bilingual and bicultural education program. In appointing the three members from each congressional district, the state board of education shall consider geographic dispersal of members' residences;

(b) Two members to represent higher education in the state, appointed by the state board of education from among nominations submitted by the provisional or regular state steering committee pursuant to subsection (4) of this section;

(c) One member, appointed by the speaker of the house of representatives from among the membership of the house of representatives;

(d) One member, appointed by the president of the senate from among the membership of the senate.

(3) (a) Prior to the expiration of

the term of the provisional state steering committee, and annually thereafter prior to the expiration of the term of any members of the regular state steering committee appointed pursuant to the provisions of paragraph (a) of subsection (2) of this section, recommendations for nominations to the regular state steering committee for such terms shall be submitted to the provisional or regular state steering committee. Recommendations for nominations submitted pursuant to this subsection (3) shall be submitted within each congressional district in the state.

(b) Within each congressional district, the following groups may make recommendations for nominations and may recommend as many individuals as are deemed necessary:

(I) Community bilingual and bicultural committees;

(II) Teachers, administrators, teachers' aides, and teacher organizations;

(III) School boards;

(IV) Parent-teacher organizations or other citizens.

(c) From among the recommendations for nominations received annually from each congressional district pursuant to paragraph (b) of this subsection (3), the provisional or regular state steering committee shall submit a total of six nominations to the state board of education, for a statewide total of thirty nominations. In submitting nominations from each congressional district, the provisional or regular state steering committee shall consider geographic dispersal of nominees' residences.

(d) From among the nominations submitted for each congressional district pursuant to paragraph (c) of this subsection (3), the state board of education shall make appointments for terms on the regular state steering committee as required by paragraph (a) of subsection (2) of this section and

by subsection (5) of this section.

(4) Prior to the expiration of the term of the provisional state steering committee, and annually thereafter prior to the expiration of the term of any members of the regular state steering committee appointed pursuant to the provisions of paragraph (b) of subsection (2) of this section, nominations for such terms shall be submitted to the state board of education by the provisional or regular state steering committee. At least twice the number of nominations shall be submitted as there are terms to be filled. From among the nominations submitted pursuant to this subsection (4), the state board of education shall make appointments for terms on the regular state steering committee as required by paragraph (b) of subsection (2) of this section and by subsection (5) of this section.

(5) The members of the regular state steering committee shall serve

for basic terms of three years; except that initial one-year and two-year appointments shall be made by the state board of education so that approximately one-third of the terms on the committee will expire in any one calendar year, taking into consideration the appointments made by the speaker of the house of representatives and the president of the senate.

(6) Members of the regular state steering committee shall hold their offices for the terms for which they have been appointed and until their successors are appointed and qualified.

(7) Appointments to fill vacancies on the regular state steering committee other than vacancies caused by the expiration of terms of office, shall be made by the state board of education; except that appointments for full terms and to fill vacancies in offices on the committee appointed by the speaker of the house of representatives and the president of the senate shall be made

in the matter provided for original appointment.

(8) The state steering committee established pursuant to subsection (1) of this section or by subsections (2) to (7) of this section shall assist the state board of education in implementing the provisions of this article. The state steering committee shall adopt guidelines for the submission of plans for bilingual and bicultural education programs by districts. Members of the state steering committee shall be reimbursed pursuant to rules and regulations of the department for their actual and necessary expenses incurred in the performance of their powers and duties under this article.

22-24-106. Powers and duties of state board of education. (1) the state board of education, in cooperation with the appropriate personnel within the department and in cooperation with the state steering committee, has the power to:

(a) Select the director of the unit of bilingual and bicultural education;

(b) Adopt all rules, regulations, and procedures it deems necessary for implementation of this article. The state board of education shall conduct public hearings with adequate notice to the general public prior to the adoption of any rules, regulations, or procedures pursuant to this article, and shall present an annual report to the general assembly concerning the overall progress of the programs.

(c) Adopt appropriate timetables for the submission of bilingual and bicultural plans by districts for the effective implementation of this article beginning with the school year 1975-76, and adopt standards, criteria, or other measures which the unit shall apply in evaluating plans submitted by such districts;

(d) Review any appeals by districts and review the bilingual and bicultural plans which are not approved by the unit;

(e) Report its evaluations or analyses of all bilingual and bicultural plans funded or rejected.

(2) The state board of education shall:

(a) Approve all tests, criteria, identification instruments, and procedures used by districts;

(b) Insure that said tests, criteria, identification instruments, or procedures are normed for relevant grographical areas; and

(c) Insure that said tests, criteria, identification instruments, and procedures are valid for the purpose of identifying students with linguistically different skills.

22-24-107. Duties of department - creation of unit. (1) The department has the duty to:

(a) Establish a unit of bilingual and bicultural education, a unit diretor, and necessary unit employees;

(b) Study, review, evaluate, and disseminate all available resources

and programs that, in whole or in part, are or could be directed towards meeting the language capability needs of students with linguistically different skills; gather and disseminate information on other successful programs existing in this state and other states; and encourage experimentation and innovation in bilingual and bicultural programs;

(c) Study, review, evaluate and disseminate to all districts on an annual basis, information on student dropout, retention, special education placement, achievement performance, and such other information as the unit deems relevant;

(d) Study, review, evaluate and disseminate all successful and innovative preservice and in-service programs for staffs of bilingual and bicultural programs and assist districts in selecting and contracting said services;

(e) Compile a data bank on bilingual and multilingual teachers and

potential graduates who have an interest in working in bilingual and bicultural programs from colleges or universities in this state and other states whom the unit identifies for the purpose of assisting districts in their independent efforts to seek bilingual teachers;

(f) Disseminate all rules, regulations, and procedures adopted by the state board of education.

22-24-108. Language identification - development of preliminary plan. (1) each district in this state shall annually conduct a census on or before October 15 or within thirty days after registration to ascertain and identify the number of school-age children in grades kindergarten through third grade with linguistically different skills residing within its boundaries in accordance with rules, regulations, and procedures adopted by the state board of education pursuant to section 22-24-106.

(2) The district shall enlist the

cooperation of and assistance from the unit in conducting the census.

(3) (a) No later than thirty days after the district has conducted its census, the school district shall notify by mail the unit and the parents or legal guardian of students identified as having linguistically different skills in grades kindergarten through third grade.

(b) The notice shall contain a plain, nontechnical description of the purposes, methodology, and content of the program and shall inform the parents or legal guardian that he has the right to enroll such student in the program, that the parents or legal guardian may visit the district's bilingual and bicultural classes as often as desired, and that the parents or legal guardian has the right to withdraw such student from the program. Said notice shall be written in English and in the language of the student's parents or legal guardian.

(c) In addition, the district shall notify by direct contact said students and their parents or legal guardian to explain more fully the purpose, methodology, and content of the program.

(4) The parents or legal guardian of a student (identified for the program or desirous of enrolling in the program) who wishes to enroll said student in the program shall do so in writing upon forms provided by the district.

(5) (a) A district shall develop a plan for a bilingual and bicultural education program in a school having fifty or more students in grades kindergarten through third grade with linguistically different skills or if ten percent of the students in a school in grades kindergarten through third grade have linguistically different skills.

(b) A district may develop a plan for a bilingual and bicultural program if there are less than fifty students in a school in grades kindergarten

through third grade with linguistically different skills of if less than ten per cent of the students in a school in grades kindergarten through third grade have linguistically different skills.

(6) In addition to the provisions of section 22-24-117, plans developed pursuant to the provisions of subsection (5) of this section:

(a) Shall deal specifically with each school within the attendance boundries of the district within which a number or percentage of students with linguistically different skills has been identified which exceeds the number or percentage specified in subsection (5) of this section;

(b) May deal with other schools within the attendance boundries of the district;

(c) Shall allow students in schools which are not eligible under this article to have the opportunity, within district policies and regulations, to enroll in those schools providing

programs approved pursuant to this article. Transportation need not be provided by the district.

(d) Shall provide for bilingual and bicultural education programs of sufficient duration and scope in grades kindergarten through third grade to meet the educational needs of students with linguistically different skills attending schools within the attendance boundries of the district.

(7) A plan for a bilingual and bicultural education program developed pursuant to the provisions of subsection (5) of this section shall be approved by the school board of each respective district affected by the provisions of subsection (5) of this section. Districts may cooperate with other districts or boards of cooperative services in developing plans pursuant to the provisions of subsection (5) of this section.

(8) All plans developed pursuant to subsection (5) of this section shall

be submitted to the department according to the provisions of section 22-24-117.

(9) Within the limitations of state appropriations for the implementation of this article, and after review of all plans submitted pursuant to subsection (8) of this section, the state board of education shall determine those plans which shall be funded from such appropriations. If the plan submitted by a district is funded pursuant to this subsection (9), said district shall implement the bilingual and bicultural education program for which the plan was developed. Nothing in this article shall be construed as prohibiting a district from implementing a bilingual and bicultural education program, the plan for which is not funded pursuant to this subsection (9).

(10) No district shall take any action which has the effect of decreasing the enrollment of students with linguistically different skills at a

school to avoid the provisions of subsections (1) to (7) of this section unless said agency is desegregating an illegally segregated school system. All plans for the elimination of racial or ethnic isolation or segregation which affect the provisions of subsections (5) to (9) of this section shall be submitted to the department together with the district's census report.

(11) If the unit determines that any district has not complied with this section, it shall immediately notify the department and said district in writing of its noncompliance. The department shall thereafter provide said district with a reasonable opportunity to comply and with the right to a hearing regarding said noncompliance in accordance with rules, regulations, or procedures established by the state board of education, in cooperation with the state steering committee.

22-24-109. Enforcement of article. A district is required to develop an

acceptable plan for a bilingual and bicultural education program in order to meet the needs of children as determined in the school census, according to the provisions of section 22-24-108 (1) and (3), and to amend such plan if it is unacceptable to the department. It is the duty of the members of the school board to carry out the provisions of such plan or portion of such plan, according to the provisions of this article, if sufficient funds are available for the implementation of this article.

22-24-110. Enrollment of students with linguisticallly different skills - enrollment of other students - notification - parental right of withdrawal. (1) No later than thirty days after the district is notified of the approval of the district's plan and the availability of funding for such program, the district shall notify the parents or legal guardian of each student to be included in the program.

(2) A district's program shall give preference to students with linguistically different skills, but said program shall also be open to all other students.

(3) Each school shall provide that an orientation session be held with the student's parents or legal guardian at the beginning of classes for the purpose of fully explaining the program in a manner and language understood by said parents or legal guardian.

(4) If the parents or legal guardian of an identified student chooses to subsequently withdraw the child from the program, he shall register such decision in writing with the district. Prior to the withdrawal of any student, the parents or legal guardian of such student shall be fully advised, during a conference with district officials and in a manner and language understood by said parents of legal guardian, of the nature of the program from which the student is being withdrawn and the

program into which the student will subsequently be placed.

22-24-111. Enrollment of nonresident students. A district may allow a nonresident student to enroll in or to attend its program, and the tuition, if any, shall be paid according to the provisions of section 22-32-115.

22-24-112. Content of programs - nonverbal courses and extracurricular activities - location of courses - class composition and size. (1) A bilingual and bicultural program shall be a full-time program of instruction in which appropriate subjects shall be given in the language of the students with linguistically different skills and in English; in which the necessary skills of comprehension, speaking, reading, and writing are taught in both languages; and in which the history, culture, and cultural contributions associated with the language of the students with linguistically different skills and the history and culture of the United States

are presented to the students in the languages which reflect the cultures of the students in the classroom.

(2) The program shall be located in the regular program of the public schools and not in a separate program, and districts shall assign students to schools in such a way that will promote, encourage, or have the effect of integrating students regardless of national origin or linguistic ability. Every district shall insure that the students enrolled in programs described in subsection (1) of this section shall have an equal and meaningful opportunity to participate fully with other students in all extracurricular activites.

(3) Classes in which a bilingual and bicultural program is taught shall be composed of pupils of approximately the same age or grade level, as determined by the district's plan.

(4) The maximum student-teacher ratio shall be set by the department and shall accommodate the educational

needs of students enrolled in a program.

(5) No district may transfer a student of linguistically different skills out of a bilingual and bicultural program unless the parents or legal guardian of the student approves the transfer in writing.

(6) The parents or legal guardian of students in grades kindergaten through third grade who do not have linguistically different skills shall be notified of such bilingual and bicultural programs, and such students shall be encouraged to enroll in the program.

22-24-113. Bilingual teachers - training - staff associates. (1) In selecting teachers for a bilingual and bicultural program, a school board, pursuant to guidelines promulgated by it, in cooperation with the community committee, shall make an affirmative effort to seek, recruit, and employ persons who are bilingual.

(2) (a) The department shall

allocate money for in-service training to districts employing teachers for bilingual and bicultural programs. In-service training shall include, but is not limited to:

(I) Development of instructional skills in reading, writing, and speaking;

(II) Development of bilingual and bicultural teaching skills;

(III) Development of abilities to identify, create, and apply instructional techniques that will enhance the cognitive and psychomotor development of children in bilingual and bicultural education programs; and

(IV) Demonstration of teaching skills relative to bilingual and bicultural education.

(b) Administrators shall be encouraged to participate in in-service training programs.

(3) Districts may employ curriculum specialists for the effective development and implementation of the

program. School boards shall make an affirmative effort to seek, recruit, and employ persons who are bilingual.

22-24-114. Teachers' aides - training - community coordinators. (1) In addition to employing bilingual teachers, each district providing bilingual and bicultural programs pursuant to this article may employ teachers' aides. The school baord shall make an affirmative effort to seek, recruit, and employ teachers' aides who are bilingual. The school board shall provide procedures for the involvement of the community committee in the screening of applicants. Teachers' aides shall not be employed for the purpose of supplanting bilingual teachers.

(2) The department shall allocate money to districts employing teachers' aides for the purpose of the upward mobility of said aides for on-the-job performance. This money shall be utilized for the purpose of in-service

training sessions so that said teachers' aides can acquire credit hours from an accredited community or junior college or four-year institution of higher education towards the acquisition of a degree. In-service training of teachers' aides shall include, but is not limited to:

(a) Development of personal skills in reading, writing, and speaking;

(b) Opportunities to develop general teaching skills;

(c) Opportunities to develop the ability to identify, create, and apply instructional techniques that will enhance the cognitive and psychomotor development of children in bilingual and bicultural education programs; and

(d) Opportunities to demonstrate practice teaching skills relative to bilingual and bicultural education.

(3) Any district which conducts bilingual and bicultural programs pursuant to this article shall employ one or more full-time or part time community

coordinators if there are fifty or more students enrolled in the program. Community coordinators shall promote communication, understanding, and cooperation between the public schools and the community and shall visit the homes of children who are to be enrolled in a bilingual and bicultural program in order to convey information about the program. An affirmative effort shall be made by the school board to seek, recruit, and employ a coordinator who is bilingual.

22-24-115. District director of bilingual and bicultural education. (1) A district in which one hundred or more pupils are enrolled in a bilingual and bicultural program shall appoint a full-time or part-time district director of bilingual and bicultural education. The district director of bilingual and bicultural education shall be qualified pursuant to the rules and regulations of the state board of education as a bilingual teacher and shall

direct the operation of the district's bilingual and bicultural program. An affirmative effort shall be made by the school board to seek, recruit, and employ a district director who is bilingual.

(2) In those districts with less than one hundred students enrolled in the program, the district shall appoint a full-time or part-time supervisor of bilingual and bicultural education who shall have general authority and responsibility for the program. The supervisor shall be qualified pursuant to rules and regulations of the state board of education as a bilingual teacher and shall supervise the operations of the program pursuant to regulations promulgated by the state board of education, in cooperation with the state steering committee. An affirmative effort shall be made by the school board to seek, recuit, and employ supervisors who are bilingual.

22-24-116. Parent and community

participation. (1) Districts should provide for the maximum involvement of parents of students enrolled in the programs. Accordingly, a regular community bilingual and bicultural committee shall be established within each district offering a bilingual and bicultural program. The parents of students enrolled in each respective program of each school shall elect at least seventy-five percent of the regular community committee according to guidelines established by the initial community committee. The parents elected shall be parents of students enrolled in the program. Any community committee shall have the option of establishing community committees for each school offering a program. In addition to the parent members of each community committee, a representative of the bilingual teachers, a representative of the bilingual teachers' aides, the community coordinator, and the district director or supervisor of bilingual and bicultural education shall be members of each respective community committee as they become employees of the district.

School principals and other administrators within the district shall be encouraged to participate and cooperate with the community committee.

(2) For purposes of establishing the initial community committee, which shall be established at least forty-five days before a district submits a plan pursuant to this article, the following shall apply:

(a) Consistent with guidelines developed by the state steering committee, the local school board shall establish procedures whereby parents whose children may be enrolled in bilingual and bicultural programs shall elect the initial community committee.

(b) The district, at least ten days before the community committee is established, shall have publicized in English and the language of the students who are likely to be identified as participants in the program reasonable and adequate notices which inform parents of their right to be candidates for election

to the community committee, of the purposes of the committee, and of the program which the committee will be planning, developing, and evaluating. Districts shall give similar notices to students enrolled in Title I and Title VII schools or in the schools likely to have a program for the purpose of having these notices delivered to the parents at home.

(c) Community committees established after the initial committee shall be formed pursuant to subsection (1) of this section.

(3) The school board shall administer the provisions of this article in accordance with the rules, regulations, and procedures adopted by the state board of education.

(4) The school board shall provide technical assistance to the community committee or committees for:

(a) Assistance in program development;

(b) Full unit participation; and

(c) Effective program implementation from funds appropriated for the implementation of this article.

(5) The district shall furnish each member of the community committee, free of charge, a copy of this article, the rules, regulations, or procedures adopted by the state board of education, the guidelines adopted by the state steering committee, the district's proposed application pursuant to this article, and such other information as is reasonably necessary for the effective involvement of the community committee. The district shall also furnish the community committee the district's and department's plans, if any, for future bilingual and bicultural programs, together with a description of the process of planning and developing said programs and the projected times at which each stage of the process will start and be completed. The district shall also furnish, and the community committee shall also have adequate opportunity to

consider, information concerning the educational needs of children with linguistically different skills residing within the district's attendance boundaries and the various programs available to meet those needs. The district shall identify those needs which should be addressed through the programs instituted pursuant to this article. The community committee shall also have an opportunity to review evaluations of prior programs, if any, and shall be informed of all performance criteria by which the programs are to be evaluated. The school board shall adopt adequate procedures to insure prompt response to complaints and suggestions from all parents whose childen are enrolled in the program.

(6) The department shall not approve any plan unless it is accompanied by the written comments of the community committee, if any, properly constituted under this section, and unless said plan has been voted upon by

the community committee. The vote, if any, of the community committee shall be given serious consideration by the department before said plan is approved.

(7) Each plan by a district for financial assistance under this article shall contain an assurance that the appropriate district official will consult at least once a month during the regular school year with the community committee, in formal meetings of such committee, with respect to the administration and operation of a program and that it will provide such committee with a reasonable opportunity to periodically observe and comment upon all program-related activities.

(8) No district shall amend its program until it has notified the state board of education and received approval.

22-24-117. Plan requirements. (1) Every district seeking financial assistance under this article shall submit a comprehensive plan for bilingual and bicultural education to the department

on forms provided by the unit at least one hundred twenty days before the beginning of each school year; except that the state board of education may adopt such other timetables as it deems appropriate for the effective and immediate implementation of this article for the school year 1975-76. In addition to materials and data the department may determine to be needed in evaluating the adequacy of plans submitted and information and assurances required elsewhere in this article, each plan submitted shall have the following components at a minimum:

(a) The findings of the census study as conducted pursuant to the provisions of section 22-24-108 (1), a listing of the eligible schools, grades, and classes to be included, and the total number of students to be enrolled;

(b) District goals and objectives for the program as they relate to the students to be enrolled;

(c) A program description of how

district program goals and objectives, as well as those objectives identified in section 22-24-102 (1), are to be achieved;

(d) A management plan as to how each school program will be organized, staffed, coordinated, and monitored;

(e) Program evaluation procedures;

(f) Methods of communicating program needs and progress to district patrons, district staff members, the district accountability committee, and the local board of education;

(g) In-service provisions to be made for district staff members; and

(h) Projected expenditures for programs required or permitted under this article.

(2) Except for the school year 1975-76, each plan shall provide for the use of teachers who have competence in the areas of comprehension, speaking, reading, and writing in the two languages used and training or experience in teaching methods specifically related to these four basic skill areas in each

language. Teacher selection shall be based upon a personal interview that identifies the candidate's relative level of competence in each of these basic skill areas. A candidate may be selected who shows strong competence in most of the basic skill areas but needs further development in the remaining skill areas; but the district is required to develop or arrange for a specific course of in-service training for that teacher in the identified basic skill areas beginning in the first term of the teacher's employment. Teacher participation in this in-service program shall be a condition of the teacher's employment.

(3) No plan shall be approved by the state board of education unless the requirements adopted by the state board of education, in cooperation with the state steering committee, have been met.

(4) The department shall not approve nonconforming plans and shall return the same to the district within

sixty days after receipt, together with written reasons for nonapproval, to allow the district a reasonable opportunity to resubmit an amended plan; except that the state board of education, in cooperation with the state steering committee, may adopt such other timetables as it deems appropriate for the full and effective implementation of this article for the school year 1975-76. Approval of a plan by the department shall be a prerequisite to state disbursement.

(5) No funds shall be disbursed to a district pursuant to this article unless said district certifies that its program will be implemented in accordance with the provisions of this article and the rules, regulations, and procedures adopted by the state board of education.

(6) Each participating district shall maintain an accurate, detailed, and separate account of all expended moneys received under this article and

any other records the unit deems necessary and shall annually report thereon to the unit for the school year ending June 30. All said accounts and records shall be available to the unit and the general public to insure that the programs are implemented in conformity with this acticle and the rules, regulations and procedures adopted by the state board of education.

(7) All disbursements under this article are supplementary to state moneys disbursed under the "Public School Finance Act of 1973", article 50 of this title, and shall not cause a reduction of any other or combination of any other state or federal moneys a district is otherwise eligible to receive.

(8) Districts or boards of cooperative services requesting financial assistance under this article shall provide assurance that funds available under this article will be used to supplement the level of other funds available for the education of children

in these programs and that funds received under this article will not be used to provide instructional or support services to pupils which are ordinarily provided with other state or local funds to all pupils. In no instance shall reimbursement under this article exceed one hundred percent of the direct attributable additional cost of programs when combined with federal funds available for these programs.

(9) Districts or boards of cooperative services that operate a program approved by the department shall be entitled to reimbursement up to an amount not to exceed one hundred percent of the direct attributable additional cost incurred by the district or board of cooperative services for:

(a) The actual position cost of:

(I) Teachers;

(II) Teachers' aides;

(III) District directors;

(IV) Supervisory personnel;

(V) Coordinators;

(VI) Curriculum specialists.

(b) The cost of approved in-service programs for teachers and teachers' aides;

(c) The cost of approved upward mobility programs for teachers' aides;

(d) The cost of additional bilingual and bicultural materials.

22-24-118. Implementation. (1) In order to effectively implement the provisions of this article initially, the following schedule shall apply;

(a) No later than November 1, 1975, the state board of education, in cooperation with the provisional state steering committee, shall adopt all rules, regulations, and procedures it deems necessary for the full and effective implementation of this article, including approval of all tests, criteria, identification instruments, and procedures used by districts to identify children of linguistically different skills pursuant to section 22-24-106 and 22-24-108.

(b) No later than January 1, 1976,

each district shall complete the census provided for in section 22-24-108.

(c) No later than April 1, 1976, each district meeting the criteria under section 22-24-108 (5) (a) shall have developed and submitted to the department a comprehensive plan for bilingual and bicultural education pursuant to section 22-24-117.

22-24-119. Tutorial grant program for the instruction of pupils with limited English language skills. (1)(a) In addition to the other provisions of this article, beginning July 1, 1975, districts are eligible to apply for grants, on an annual basis, from the state board of education to provide tutorial programs for children enrolled in the schools of the district who are identified under Title VI of the "United States Civil Rights Act of 1964" as those who speak only a language other than English.

(b) The state board of education shall promulgate rules and guidelines

for the implementation of this section. The department shall review all applications for grants under paragraph (a) of this subsection (1). The department shall approve an application for such a grant only if it determines that:

(I) The school district has a comprehensive plan for a tutorial program designed to effectively remedy the English language deficiencies of children identified pursuant to paragraph (a) of this subsection (1);

(II) The tutorial program plan includes an accountability component which identifies the needs of the children with English language deficiencies, defines measurable objectives for such children, and evaluates the progress of such children toward the defined objectives;

(III) The tutorial program conforms with the rules and regulations of the state board of education;

(2) The state board of education shall report annually to the general

assembly on all approved grants. Such report shall include the number of children served, the number of teachers or teacher aides employed exclusively to remedy English language deficiencies (or that portion of the activities of teachers or teacher aides which is exclusively attributable to the remedying of English language deficiencies), and the extent to which the special language needs of children identified pursuant to paragraph (a) of subsection (1) of this section are being met.

(3) Funds received pursuant to this section may be expended by districts for the employment of teachers or teacher aides for that portion of their activities which is exclusively attributable to the purposes of this section. Districts may also expend such funds for the reasonable costs of teacher aide training and instructional materials which are directly related to the tutorial programs established by this section. No funds appropriated to implement the

provisions of this section shall be used to teach children any language other than English.

(4) (a) Beginning July 1, 1975, each district for which a tutorial program is approved by the department shall be entitled to receive a special tutorial grant for each child identified pursuant to paragraph (a) of subsection (1) of this section enrolled in the tutorial program.

(b) In the event that funds appropriated for the implementation of this section for any fiscal year are not sufficient to meet the requirements of paragraph (a) of this subsection (4), the state board of education shall prorate the total of the funds appropriated among all eligible districts in the proportion which each district's entitlement bears to the total entitlement.

SECTION 2. 24-1-115, Colorado Revised Statutes 1973, is amended BY THE ADDITION OF A NEW SUBSECTION to read:

24-1-115. Department of education

- creation. (6) The department of education shall include the unit of bilingual and bicultural education.

SECTION 3. Appropriation. There is hereby appropriated, out of any moneys in the state treasury not otherwise appropriated, to the department of education, for the fiscal year commencing July 1, 1975, the sum of two million three hundred fifty thousand dollars ($2,350,000), or so much thereof as may be necessary, for the implementation of this act (excluding section 22-24-119, Colorado Revised Statutes 1973), and the sum of two hundred thousand dollars ($200,000) is hereby appropriated for the implementation of section 22-24-119, Colorado Revised Statutes 1973.

SECTION 4. Safety clause. The general assembly hereby finds, determines, and declares that this act is necessary for the immediate preservation of the public peace, health, and safety.

Ruben A. Valdez
SPEAKER OF THE HOUSE
OF REPRESENTATIVES

Fred E. Anderson
PRESIDENT OF THE
SENATE

Evelyn T. Davidson
CHIEF CLERK OF THE HOUSE
OF REPRESENTATIVES

Comfort W. Shaw
SECRETARY OF
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-702

CONGRESS OF HISPANIC EDUCATORS, *et al.*,

Petitioners,

—v.—

SCHOOL DISTRICT NO. 1, DENVER, COLORADO, *et al.*,

Respondents.

MOTION TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF THE PUERTO RICAN LEGAL DEFENSE AND EDUCATION FUND, INC. IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT OF THE CONGRESS OF HISPANIC EDUCATORS.

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-

CONGRESS OF HISPANIC EDUCATORS, et al.,
Petitioners,

vs.

SCHOOL DISTRICT NO. 1, DENVER, COLORADO, et al.,
Respondents.

MOTION TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF THE PUERTO RICAN LEGAL DEFENSE AND EDUCATION FUND, INC. IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT OF THE CONGRESS OF HISPANIC EDUCATORS.

SUBJECT INDEX

Page

Motion of the Puerto Rican Legal Defense and Education Fund, Inc. For Leave to File Brief *Amicus Curiae* vi

Interest of *Amicus Curiae* 1

Preliminary Statement 1

Reasons for Granting the Writ . . . 1

Introduction 1

A Profile of Puerto Ricans. . 1

Bilingual-Bicultural Education 3

By Unduly Restricting The District Court's Equitable Power, The Court of Appeals Has Raised Important Issues Which Should Be Reviewed By This Court. 7

The Analysis of The Court of Appeals Was Erroneous 11

Conclusion. 15

TABLE OF AUTHORITIES CITED

Cases

Pages

Arvizu v. Waco Independent School District, 373 F.2d 499 (5th Cir. 1974). 11

Aspira of New York v. Board of Education of the City of New York, 72 Civ. 4002 (S.D.N.Y. 1972), 65 F.R.D. 541 (S.D.N.Y. 1975) . vii, 11

Brown v. Board of Education of Topeka, 347 U.S. 483 (1954) . . . 7

Brown v. Board of Education of Topeka, 349 U.S. 294 (1955) . 7, 8, 14

Evans v. Buchanan, Civ. Act. No. 1816 (D. Del. October 21, 1975) . vii

Green v. County School Board, 391 U.S. 430 (1968) 12

Griffen v. County School Board, 377 U.S. 218 (1964) 8

Hernandez v. Texas, 347 U.S. 475 (1954) 1

Katzenbach v. Morgan, 384 U.S. 641 (1966) 1

Keyes v. School District No. 1, Denver, 413 U.S. 189 (1973) . 1, 2, 9

Table of Authorities Cited

Pages

Keyes v. School District No. 1, Denver, 313 F. Supp. 61 (D. Col. 1970). 9, 10

Keyes v. School District No. 1, Denver, 380 F. Supp. 673 (D. Col. 1974). 9, 14

Lopez de Vega v. Thomas, Civ. No. 75-714 (E.D. Pa. 1974). . . . vii

Morgan v. Hennigan, 379 F. Supp. 410 (D. Mass. 1974) 11

Morgan v. Kerrigan, No. 72-911, (D. Mass. June 5, 1975) vi

Rios v. Reed, 75 Civ. 296 (E.D.N.Y. 1975) vii

Serna v. Portales Municipal Schools, 499 F.2d 1147 (10th Cir. 1974). 11

Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971). 9

United States v. Board of Education of Waterbury, Civ. Act. No. 13,465 (D. Conn. May 15, 1975). . vii

Table of Authorities Cited

Pages

United States v. Montgomery County Board of Education, 395 U.S. 225 (1970). 8

United States v. State of Texas, 342 F. Supp. 24 (E.D. Tex. 1971), aff'd 466 F.2d 518 (5th Cir. 1972) 11

White v. Register, 412 U.S. 755 (1973) 1

Wright v. Council of the City of Emporia, 407 U.S. 451 (1972) . . 9

Statutes

20 U.S.C. Section 880b 3

20 U.S.C. Section 1601 et seq. . . 11

Texts

J. Coleman, Equality of Educational Opportunity (1966) 5

C. Lavatelli, Piaget's Theory Applied to An Early Childhood Education (1973) 5

M. Seville and R. Troike, A Handbook of Bilingual Education (rev. ed. 1971). 5

Table of Authorities Cited

Pages

United States Commission on Civil Rights; A Better Chance to Learn: Bilingual-Bicultural Education (May, 1975). 4, 6

United States Dep't of Commerce, Bureau of the Census; Persons of Spanish Origin in the United States, November, 1969 (February, 1971). 2

United States Department of Health, Education and Welfare; Programs Under Bilingual Education Act (Title VII, ESEA): Manual For Project Applicants and Grantees (1971) 4

Wagenheim, A Survey of Puerto Ricans on the U.S. Mainland in 1970 (1975) 2, 3

MOTION OF THE PUERTO RICAN LEGAL DEFENSE AND EDUCATION FUND, INC. FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The Puerto Rican Legal Defense and Education Fund, Inc. (the "Fund") requested the parties in this case to consent to the filing of the attached brief amicus curiae. Only petitioners have granted their consent; respondents, however, do not object to the filing of an amicus curiae brief.[1]

The Fund is a privately funded, not-for-profit, New York corporation organized in 1972. Its mandate includes conducting litigation concerning issues which affect the Puerto Rican community as a whole. In that connection, the Fund has commenced and participated in lawsuits involving voting rights, public assistance, migrant labor, employment discrimination and criminal justice.

In addition, the Fund devotes a substantial amount of its resources to educational rights litigation. Many of these lawsuits involve the implementation of bilingual-bicultural educational programs to remedy the deprivation of an equal educational opportunity. In Boston, (Morgan v. Kerrigan, No. 72-911 (D. Mass. June 5, 1975)) (Memorandum of Decision

1. Petitioners' and respondents' letters have been filed with the Clerk.

and Remedial Orders); Waterbury, Connecticut (United States v. Board of Education of Waterbury, Civ. Act. No. 13, 465, (D. Conn. May 15, 1975)) (Ruling on motion to intervene); Wilmington, Delaware (Evans v. Buchanan, Civ. Act. No. 1816 (D. Del. October 21, 1975)) (Order granting motion to intervene); New York City (Aspira of New York v. Board of Education of City of New York, 72 Civ. 4002 (S.D.N.Y. 1972), see 65 F.R.D. 541 (S.D.N.Y. 1975)); Philadelphia (Lopez de Vega v. Thomas, Civ. No. 75-714 (E.D. Pa. 1974)), and in Suffolk County, New York (Rios v. Reed, 75 Civ. 296 (E.D.N.Y.)), the Fund is prosecuting lawsuits which seek or have already achieved for Hispanos implementation of the type of remedy which the Tenth Circuit rejected. The Circuit Court's opinion runs counter to a growing body of authority which requires school districts to adopt bilingual-bicultural educational programs to rectify violations of the rights of Hispanos to an equal educational opportunity.

The Fund has a substantial interest in checking the Tenth Circuit's unwarranted interference with the District Court's proper exercise of its equitable authority to adopt appropriate and effective remedies for the unlawful educational deprivation suffered by Hispanos in Denver. The annexed brief amicus curiae is submitted to apprise this Court of the national implications of the Tenth Circuit's decision, particularly as to children in tri-ethnic communities.

Wherefore, the Fund respectfully requests that the instant motion to file the accompanying brief amicus curiae be granted.

Dated: November 13, 1975

Respectfully submitted,

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INTEREST OF AMICUS CURIAE

The interest of amicus curiae is set forth in the accompanying motion, supra.

PRELIMINARY STATEMENT

Amicus curiae relies on petitioners' treatment of this Court's jurisdiction, the questions presented for review, constitutional and statutory provisions involved, and the statement of the case.

REASONS FOR GRANTING THE WRIT

Introduction:

A Profile of Puerto Ricans

According to the 1970 census, there are at least 10.6 million "persons of Spanish origin" in the United States. Hispanos constitute the Nation's second largest minority, and, in part, because they have suffered from pervasive patterns of discrimination, this Court has deemed them to be an identifiable group for purposes of the Fourteenth Amendment. See, e.g., Keyes v. School Dist. No. 1, Denver, 413 U.S. 189 (1973); White v. Register, 412 U.S. 755 (1973); Hernandez v. Texas, 347 U.S. 475 (1954); see also, Katzenbach v. Morgan, 384 U.S. 641 (1966).

There are four major groups of "persons of Spanish origin" according to the census: Mexican Americans (6.3 million), Puerto Ricans (1.5 million), Cubans (0.7 million), and persons of "Central or South American

or other Spanish origin" (2.0 million).

Although over one million Puerto Ricans reside in New York City, there are significant and growing numbers of Puerto Ricans in Connecticut, Massachusetts, New Jersey, Pennsylvania, Illinois, Ohio and Florida. These communities or "barrios" generally exist in urban areas. Wagenheim, A Survey of Puerto Ricans on the U.S. Mainland in 1970, (Praeger, 1975) (hereinafter cited as "Wagenheim"). Frequently, they exist side by side with black communities and white communities forming what is commonly termed a tri-ethnic city.

As a result of many of the same forces that have relegated blacks to the lower rungs of the socio-economic ladder, as well as other factors peculiar to persons who are culturally distinct and whose first language is not English,[2] Puerto Ricans have suffered severely in attempting to secure for their children the benefits of an equal and effective educational opportunity.[3]

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2. According to the United States Department of Commerce, Bureau of the Census; Persons of Spanish Origin in the United States, November, 1969; series p-20, No. 213 (February, 1971), p. 10, 72.1 percent of Puerto Ricans speak Spanish as their first language.

3. Keyes v. School Dist. 1, Denver supra at 197.

On the average Puerto Ricans have less formal education than either blacks or whites. The median number of years of completed schooling (8.6) is approximately the same as that completed by the population of the United States thirty years ago. Nearly 24 percent of Puerto Rican adults (age 25 and above) have completed less than five years of school, as compared with 5 percent of the total United States population and 13.5 percent of the black population. Only 19.8 percent of Puerto Rican adults have completed four years of high school, compared with a United States average of 56.4 percent for whites and 34.7 percent for blacks. Dropping out from school still remains a critical problem for Puerto Ricans: in 1970, among Puerto Ricans between the ages of 16-21, 55 percent were not in school, and 36 percent of these dropouts were unemployed.[4]

Bilingual-Bicultural Education

In an effort to secure for Puerto Ricans, and Hispanos generally, a better and more meaningful educational opportunity, the United States Congress passed Title VII of the Elementary and Secondary Education Act, 20 U.S. §880b (1968), as amended, known as the Bilingual Education Act. Although that legislation, which is essentially a funding source for bilingual-bicultural educational programs, is directed to students with "limited English-speaking ability", it is now accepted that bilingual-bicultural education programs have other objectives which go beyond

4. Wagenheim, pp. 18-21.

rectifying English language deficiencies. The Department of Health, Education and Welfare's definition of bilingual-bicultural education states:[5]

> Bilingual Education is the use of two languages, one of which is English, as mediums of instruction for the same pupil population in a well-organized program which encompasses part or all of the curriculum and includes the study of the history and culture associated with the mother tongue. A complete program develops and maintains the children's self-esteem and a legitimate pride in both cultures. (emphasis added).

A recent study conducted by the United States Commission on Civil Rights entitled, A Better Chance to Learn: Bilingual-Bicultural Education, Clearinghouse Publication 51 (May 1975), concludes at page 141 with the following:

> Although bilingual-bicultural education has been criticized for nurturing ethnic separateness in this country, it can provide one of the best means for diminishing such separation. Without full economic and social opportunity, language minority groups will almost certainly remain isolated, outside the American mainstream.

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5. U.S. Department of Health, Education and Welfare, Programs Under Bilingual Education Act (Title VII, ESEA): Manual For Project Applicants and Grantees (1971), 1.

> If bilingual-bicultural education fulfills its promise to provide educational skills, knowledge, and English language proficiency, it can be a major step in helping to remove the barriers which currently exclude language minority groups from that mainstream. Moreover, it can provide opportunities for all children to learn about and experience the benefits of a multicultural society.

A child's positive self-concept has been emphasized as a sine qua non for effective learning.[6] Language minority group students, including Hispanos, according to a 1966 report by Dr. James Coleman, generally view themselves as not being able to achieve success and doubt to a greater extent than white-Anglo students their ability to learn.[7]

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6. See, e.g. Celia S. Lavatelli, Piaget's Theory Applied to An Early Childhood Education, (Boston: A Center for Media Development, Inc., 1973) p. 42; Muriel R. Seville and Rudolf C. Troike, A Handbook of Bilingual Education, (rev. ed. 1971), p. 32.

7. James Coleman, Equality of Educational Opportunity, Office of Education, U.S. Department of Health, Education, and Welfare. Washington, D.C.; U.S. Government Printing Office, 1966, pp. 288-290.

The United States Commission of Civil Rights attributes this negative self concept to the orientation of many of the school systems in which Hispanos are enrolled:[8]

> It is little wonder that the monolingual English school system fails to provide language minority children the experiences which ensure success and build a positive self concept when their native language and culture are almost totally excluded from every aspect of the school process. Without teachers, instruction, instructional materials, and parents to which language minority children can relate, it is virtually impossible to provide an environment conducive to learning and the development of positive self concept.

That one of the principle purposes of bilingual-bicultural education programs is to alleviate the alienation, and incompatibilities experienced by many Hispano students was clearly expressed by the Commission:[9]

> Bilingual-bicultural education is designed to help the child make the transition from home to school more easily by reducing the differences between the language and culture of the home and that of the school.

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8. A Better Chance to Learn: Bilingual-Bicultural Education, supra at pp. 36-37.

9. Id. at p. 38.

For Puerto Ricans and for Mexican Americans, complete and effective eradication of the consequences of segregation and other forms of education discrimination will often require modification of a school system's orientation. Adopting bilingual-bicultural educational programs as a form of compensatory education is a reasonable and accepted approach to removing barriers which obstruct the expeditious dismantling of a dual school system. Unless district courts are free to exercise their traditionally broad equitable powers to remedy the historic, well recognized effects of a discriminatory school system on Hispanos, any remedy in a tri-ethnic desegregation suit will fail.

By Unduly Restricting The District Court's Equitable Power, The Court of Appeals Has Raised Important Issues Which Should Be Reviewed By This Court

This Court has made it clear that in fulfilling the promise of Brown v. Board of Education of Topeka, 347 U.S. 483 (1954), district courts are to be afforded the widest latitude in fashioning appropriate and effective remedies. As far back as Brown v. Board of Education of Topeka, 349 U.S. 294 (1955) (Brown II) this Court noted the unique posture of the local district court, its knowledge of and sensitivity to the community under

its jurisdiction, and underscored that variations in local settings require various approaches in redressing discriminatory educational practices:

> In fashioning and effectuating the decrees, the courts will be guided by equitable principles. Traditionally, equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs. These cases call for the exercise of these traditional attributes of equity power. At stake is the personal interest of the plaintiffs in admission to public schools as soon as practicable on a nondiscriminatory basis. To effectuate this interest may call for elimination of a variety of obstacles in making the transition to school systems operated in accordance with the constitutional principles set forth in our May 17, 1954, decision.
>
> Courts of equity may properly take into account the public interest in the elimination of such obstacles in a systematic and effective manner. Id. at 300.

See, United States v. Montgomery County Board of Education, 395 U.S. 225, 235 (1970); Griffen v. County School Board, 377 U.S. 218, 232-233 (1964). In the

evolution of desegregation, flexibility in approach has been the standard, and district courts have employed a panoply of techniques to effectively secure for school children an equal educational opportunity. See, Swann v. Charlotte - Mecklenburg Board of Education, 402 U.S. 1,15 (1971); Wright v. Council of the City of Emporia, 407 U.S. 451 (1972).

The Denver school system is tri-ethnic, a feature which any effective desegregation plan must reflect. Like so many southwestern and northern school districts, it contains large numbers of Hispano school children, who suffer from the same educational deprivations as black children. Keyes v. School District, No. 1, Denver, supra at 197. Indeed, in Denver, Hispano school children comprise a larger portion of the student body than blacks. Keyes v. School District No. 1, Denver, 380 F. Supp. 673, 674 (D. Colo. 1974). The District Court found that these children were not only unlawfully segregated, but suffered from the usual by-products of segregation: low average scholastic achievement, less experienced teachers, higher dropout rates, and inferior physical plants. 313 F. Supp. at 77. Any remedy to dismantle Denver's dual school system could not stop at merely reshuffling black, white and Hispanic

school children. Compensatory programs would have to be established to eradicate the effects of a discriminatory education. The District Court properly concluded on the basis of an extensive record that any effective remedy must contain appropriate comprehensive compensatory educational programs:

> The ideal approach, and that which offers maximum promise of success, is a program of desegregation and integration coupled with compensatory education. Desegregation in and of itself cannot achieve the objective of improving the quality of the education in schools. It must be carried out in an atmosphere of comprehensive education and preparation of teachers, pupils, parents and the community. It also must be coupled with an intense and massive compensatory education program for the students if it is to be successful. 313 F. Supp. at 97.

The adoption of the so-called Cardenas plan constituted for Hispanos just such a program. That bilingual-bicultural educational programs were ordered as part of an overall scheme to end unlawful education discrimination is not startling. Other district courts have ordered programs virtually

identical to the Cardenas plan when dismantling school systems containing significant numbers of Hispanos. See, United States v. State of Texas, 342 F. Supp. 24 (E.D. Tex. 1971), aff'd 466 F. 2d 518 (5th Cir. 1972); Arvizu v. Waco Independent School District, 373 F. 2d 499 (5th Cir. 1974); Morgan v. Kerrigan, (Civ. Act. No. 72-911, June 5, 1975), Morgan v. Hennigan, 379 F. Supp. 410 (D. Mass. 1974); cf. Serna v. Portales Municipal Schools, 499 F. 2d 1147 (10th Cir. 1974); Aspira of New York v. Board of Education of the City of New York, supra. The United States Congress has also recognized the need for bilingual-bicultural programs in eliminating segregation and overcoming minority group isolation by authorizing funds to establish such programs in school systems undergoing desegregation. 20 U.S.C. §§1601, 1603, 1607(c)(1) (1972).

The Analysis of The Court of Appeals Was Erroneous

The limitations imposed by the Court of Appeals upon the District Court's equitable power stems from the Court's determination that implementing bilingual-bicultural programs for purposes of compensating for past discrimination required a "finding, on remand, that either the School District's curricular offerings or its methods of educating minority students constituted illegal

segregative conduct or resulted from such conduct." In the context of fashioning relief, the Court of Appeal's narrow view was tantamount to holding that even though a violation of the equal protection clause had been established, and even though the unfortunate by-products of discrimination were well substantiated, the District Court could not adopt a compensatory education program to eradicate these by-products unless each aspect of the school program to be affected also was proven to be unlawfully discriminatory.[10] Confining in this way the scope of a district court's power to forge broad remedies in cases involving system - wide discrimination contradicts this Court's "root and branch" formula announced in Green v. County School Board, 391 U. S. 430 (1968). Further, it would prevent a district court from removing obstacles to full and prompt compliance unless those obstacles were demonstrated to be illegal themselves. Apart from whether the educational program offered to Hispanos was discriminatory, the District Court was presented with ample evidence to conclude that to successfully remedy the effects of a segregated and otherwise discriminatory education, bilingual-bicultural education was appropriate, indeed necessary.

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10. Since the Court of Appeals reversed the District Court's adoption of the so-called Cardenas plan, it found no justification (Footnote cont'd)

As a result of its reasoning, the Tenth Circuit assumed the role of a trial court, superimposed its judgment on that of the District Court's and the educators to whom it listened, and found that bilingual-bicultural programs were suitable only to students

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10. (Footnote cont'd) for clustering Hispano students temporarily in designated pilot schools in order to implement bilingual-bicultural programs. Clustering certain students is a well-recognized dimension of a bilingual-bicultural program. The District Court in Morgan v. Kerrigan, supra considered the clustering of students in accommodating bilingual-bicultural programs in Boston: "Assignment of bilingual students before others will prevent excessive dispersal. Thus the clustering of bilingual classes will be possible and Boston's schools will be enabled to fulfill the promise of this state's exemplary bilingual education law (Transitional Bilingual Education Act, Mass. G.L. c. 71A), as well as to meet requirements of the federal Civil Rights Act of 1964 (42 U.S.C. §2000d). See 35 Federal Register 11595 (1970); Lau v. Nichols, 1974, 414 U.S. 563; United States v. Texas Education Agency, 5 Cir. 1972 (en banc), 467 F. 2d 848, motion to clarify mandate denied, 5 Cir. 1973, 470 F. 2d 1001." at p. 66.

with English language handicaps. Although the trial court cited language deficiencies as one of the obstacles which bilingual-bicultural compensatory educational programs address, it described other obstacles which justified adopting these programs. For example, the Court of Appeals disregarded the trial court's reliance on Dr. Cardenas' testimony respecting the isolation of Hispanic students by virtue of the school system's orientation. 380 F. Supp. at 694-695. Effecting a change in that orientation by implementing bilingual-bicultural programs would, according to the testimony relied on by the District Court, facilitate the realization of nondiscriminatory education.

Thus, the District Court in Denver as well as other courts (See p. 11 supra) were persuaded by the substantial testimony of educators that effective integration of the schools of a tri-ethnic community, consistent with the standards established by this Court, necessitated the introduction of bilingual-bicultural compensatory programs for a wide variety of students, including those who do not suffer from English language difficulties. By overturning this exercise of equitable power, particularly by substituting its view of the purpose of bilingual-bicultural compensatory education for that of the trial court's, the Court of Appeals has ignored the teachings of Brown II and the litany of cases which followed.

CONCLUSION

The decision of the Tenth Circuit raises important questions concerning a district court's power to adopt compensatory programs for Hispanic school children to remove obstacles to thorough and prompt desegregation. As desegregation continues to move North into tri-ethnic cities, it is imperative that the equitable authority of district courts which has been limited and obscured by the Tenth Circuit is clarified.

The Petition for Writ of Certiorari should be granted.

Dated: November 13, 1975

Respectfully submitted,

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SCHOOL DISTRICT NO. 1, DENVER, COLORADO, et al.

MEMORANDUM OF KEYES ET AL. IN SUPPORT OF CERTIORARI

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SCHOOL DISTRICT NO. 1, DENVER, COLORADO, et al.

MEMORANDUM OF KEYES ET AL. IN SUPPORT OF CERTIORARI

Wilfred Keyes, et al., plaintiffs below, respectfully submit this memorandum in support of the petition for certiorari filed herein by the Congress of Hispanic Educators, et al., for the reasons set forth below.

1. Plaintiffs Keyes, et al., supported the proposed bilingual bi-cultural education plan submitted by the intervenors in the courts below. The plan was designed to complement, but not be a substitute for, desegregation of the pupils, teachers and schools of the system. The Cardenas Plan was compatible with and supportive of plaintiffs' pupil and faculty desegregation proposals. We submit that the District Court's order with respect to the Cardenas Plan was fully justified by the record in this case and was within the District Court's remedial powers.

2. The District Court, in setting forth guidelines for planning the desegregation of the system, said that a viable

plan must be "fair in relationship to the objectives to be achieved and the manner of achieving them." (Jt. App. 167a) The trial judge, who has devoted a great deal of time and attention to this case in numerous proceedings since 1969, understood the need for special attention to the problems of desegregation planning in Denver, a community with two minority groups, Blacks and Chicanos. Judge Doyle was mindful of the need to devise a desegregation plan which dealt fairly with the pupils of both minority groups as well as the Anglo majority. He knew that it was necessary to avoid a plan which would remedy segregation of blacks by either further disadvantaging Chicanos or ignoring their legitimate concerns about equality of educational opportunity. Judge Doyle's decision to include bilingual and multicultural educational programs as a part of the desegregation plan was related by the Judge to his guideline of "Providing Equal Educational Opportunity for All." (210a) Judge Doyle's order with respect to the Cardenas Plan is justified by the court's power and duty to insure that its remedial orders are in accord with "the sense of basic fairness inherent in equity." *Swann* v. *Board of Education,* 402 U.S. 1, 31 (1971).

3. We submit that the Court of Appeals was not correct in disapproving the district court's order on the basis that it was unwarranted intrusion by the district court into matters of educational policy and judgment. The District Court avoided the error of unnecessarily intruding into the defendants' sphere of educational judgments. The District Court knew that the local authorities in Denver had failed and refused to live up to their duty to remedy the segregated system despite repeated opportunities. The default of the school board to propose an adequate desegregation measure was a major part of the problem faced by the district judge:

> Accordingly, the Board has for the past four years and even in the recent past, notwithstanding the mandate of the Supreme Court of the United States, consistently resisted and opposed every desegregation effort and has sought to avoid the effects of such orders. The court finds, therefore, that the Board of Education has not in the past shown a willingness to formulate a desegregation plan; that it now refuses to do so; and that according to every probability it will continue to avoid and refuse to desegregate the school system. The court finds that further efforts to compel them to do so would be unavailing. (167a)

This pattern of recalcitrance by the defendants made it necessary for the Court to look to its own consultant and to the plaintiffs and intervenors for expertise in formulating a remedial plan. The Cardenas Plan, and the accompanying addendum prepared by local Denver members of the Congress of Hispanic Educators was the only adequate plan made available to the District Court to deal with the special problems of Chicano pupils involved in the system-wide desegregation effort mandated by the Fourteenth Amendment.

But notwithstanding the Board's lack of cooperation the District Court's actual order with respect to the Cardenas Plan was moderate, flexible, and respectful of the local Board's prerogatives with respect to matters of educational policy and administration. The Court did not order blanket implementation of the Cardenas proposal. Rather it limited its order to a requirement that the defendants develop an appropriate bi-lingual and bi-cultural educational program "in accordance with the model presented by Dr. Jose Cardenas or a plan substantially and materially similar thereto and incorporating to the extent feasible the proposals set forth in the Addendum to the Cardenas Plan." (106a) Thus

the Board had an opportunity to adapt the program to its own views as to the feasibility and desirability of particular suggestions. The defendants were ordered to engage their own qualified consultants to assist in developing the program under the direction of the school authorities. (107a) Finally the District Court limited its order to an initial requirement that the program be implemented at a pilot basis at four elementary schools, one junior high and one high schools. (One of the elementary schools involved, DelPueblo, already had begun a bi-lingual education program prior to the court order). Thus the court's order involved no infringement of the board's prerogatives beyond what was necessary to insure a satisfactory remedy of the constitutional violation.

Respectfully submitted,

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INDEX

PAGE

Statement of Case 1
Reasons for Denying the Writ 5

I. The petition raises no new questions of substantial significance or importance 5

A. The Question of Whether the Fourteenth Amendment Requires that Public Schools Provide, for Linguistic Minorities, More than Programs Designed to Correct Deficiencies in Basic English Skills is Controlled by Previous Decisions of This Court 5

B. The Renewed Claim that the Vacated Remedy Plan was Justified by a Violation of §601 of the Civil Rights Act of 1964 Raises No Question Requiring the Attention of This Court at This Time 7

I. The holding of the court of appeals that the Cardenas Plan went beyond the nature of the constitutional violation is fully in accord with this Court's decisions and does not conflict with the decisions of any other court of appeals 8

A. The Court of Appeals Faithfully Followed this Court's Guidelines 8

B. There is No Conflict Among the Circuit Courts, and in Particular There is No Conflict Between the Tenth Circuit and Fifth Circuit 10

C. The Court of Appeals Correctly Determined the Applicability of Federal Statutory Standards and Regulations in Guidelines Promulgated Thereunder; Its Decision in No Way Conflicts with any Decision of this Court or any other Court of Ap-

PAGE

peals Regarding the Applicability of Such Standards Pertaining to Language Deficiencies of Public School Pupils 13

Conclusion 14

TABLE OF AUTHORITIES

CASES

Arvizu v. Waco Independent School District, 495 F.2d 499 (5th Cir. 1974) 11n

Brown v. Board of Education of Topeka, 347 U.S. 483 (1954) 5

Cisneros v. Corpus Christi Independent School District, 467 F.2d 142 (5th Cir. 1972) 11, 12

Davis v. School District of City of Pontiac, Inc., 474 F.2d 46 (6th Cir. 1973) 10

Katzenbach v. Morgan, 384 U.S. 641 (1966) 7

Keyes v. School District No. 1, 413 U.S. 189 (1973) 7, 9, 12

Lau v. Nichols, 414 U.S. 563 (1974) 3, 5, 6, 6n, 14

Milliken v. Bradley, 418 U.S. 717 (1974) 8

Morales v. Shannon, 516 F.2d 411 (5th Cir. 1975) ... 11

San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973) 4, 5

Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971) 8, 9, 10, 12

United States v. Texas (San Felipe-Del Rio), 466 F.2d 518 (5th Cir. 1972) 10, 12

United States v. Texas Education Agency (Austin), 467 F.2d 848 (5th Cir. 1972) 12

Zamora v. New Braunfels Independent School District, 519 F.2d 1084 (5th Cir. 1975) 12

CONSTITUTION

United States Constitution, Amendment XIV .. 4, 6, 7, 13

STATUTES

42 U.S.C. §2000d 3, 4, 6, 7, 13, 14

IN THE

Supreme Court of the United States

October Term, 1975

No. 75-702

CONGRESS OF HISPANIC EDUCATORS, *et al.*,
Petitioners,

vs.

SCHOOL DISTRICT NO. 1, DENVER, COLORADO, *et al.*,
Respondents.

BRIEF IN OPPOSITION TO CERTIORARI

Statement of the Case

The petition seeks review of the order of the court of appeals vacating a portion of the district court's decree prescribing the remedy for the "dual system" found to exist in Denver. The portion vacated was a pilot bilingual-bicultural program "particularly directed toward the educational problems of Mexican-American children" (380 F. Supp. at 94; App., p. 199a), at four elementary schools which were to remain sustantially (77%-88%) minority (Hispano) and at two secondary schools. As described by the court of appeals, the program ordered would:

> . . . extend to matters of educational philosophy, governance, instructional scope and sequence, curriculum, student evaluation, staffing, non-instructional service and community involvement . . . [include] a mechanism for comprehensive monitoring of the program's status . . . [c]ontinuing evaluation by ten "Equal Educational Opportunities Committees," each composed in part of persons from outside the school system . . . [and] touch virtually every aspect of curriculum planning,

> methodology and philosophy presently the responsibility of local school authorities . . . [The plan proposed] the inclusion of specific courses in the curriculum, adoption and publication of specific educational principles, provision of early childhood education (beginning at age three) and adult education for minorities, and provision of adequate clothing for poor minority school children. 521 F.2d at 480; App. p. 49a, 50a.

Petitioners seek the reinstatement of this "adjunct" to the desegregation decree and further seek its implementation throughout the school system, i.e., in a fully integrated setting. (Pet. p. 46, n. 9)

Following remand from this Court, *Keyes* v. *School District No. 1*, 413 U.S. 189 (1973), and after a hearing, the district court found that ethnic imbalance throughout the school district was the product of certain segregative acts in the Park Hill area in the early 1960s (368 F. Supp. at 210; App. p. 281a). The constitutional violation was limited to racial segregation of pupils.

After determining that "the Denver system is a dual system within the Supreme Court's definitions" (368 F. Supp. at 210; App., p. 282a), and after a hearing on the question of the remedy to be required, the district court made certain findings regarding the bilingual-bicultural program, known as the Cardenas Plan and addendum thereto, and ordered its implementation. 380 F. Supp. at 180, 681; App. pp. 148a, 149a; ibid. at 692, 694-696; App. pp. 189a-191a, 199a-207a; App. pp. 106a, 107a.

The district court recognized

> . . . that most of our Spanish surnamed or Mexican-American children are able to speak English and thus teaching in the Spanish language would not be necessary. 380 F. Supp. at 692; App. p. 191a.

That finding was supported, in the record, by defendant's

Exhibit YA, which showed the resuts of a survey made during the year of the trial which identified 136 pupils having Spanish as their home language as "needing intensive help." Another 115 needed "extra help." The total number of Hispano pupils in the schools that year was 20,074, in a total enrollment of 85,438 (see 521 F.2d at 483, n. 22; App. pp. 58a, 59a). The district court also found that "many" Hispano pupils were expected "to acquire normal basic learning skills which are taught through the medium of [an] unfamiliar language." 380 F. Supp. at 695; App. p. 203a.

The district court then concluded that

> Some provisions for effecting a transition of Spanish-speaking children to the English language will clearly be a necessary adjunct to this Court's desegregation plan. Id.; App. p. 203a.

and took note of this Court's decision in *Lau* v. *Nichols*, 414 U.S. 563, (1974) holding that non-English-speaking Chinese pupils were entitled to special instruction in English under §601 of the Civil Rights Act of 1964, 42 U.S.C. §2000d.[1]

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[1]The district court also adverted to its earlier findings, following the first trial on the merits in 1970, (see 315 F. Supp. at 77-85, and 313 F. Supp. at 91, 96, 97) that schools with predominately minority pupil concentrations provide inferior educational opportunity. 380 F. Supp. at 682; App. p. 156a. But in these earlier findings of the district court, the inferior nature of such schools was held to be caused by ethnic concentration or isolation. 313 F. Supp. at 81, 82. (See 521 F.2d at 481 n. 17; App. 51a, 52a) The primary remedy was, accordingly, ethnic balance or desegregation. The trial judge (the same judge who heard the recent proceedings; see Pet., p. 11, n. 3) observed,

> Thus, the only hope of raising the level of these students and for providing them the equal education which the Constitution guarantees is to bring them into contact with classroom associates who can contribute to the learning process; 313 F. Supp. at 96, 97.

Compensatory education was also required in the 1970 remedy order. (The order was not implemented because the holding of violation was reversed on appeal.) But the Compensatory education ordered was directed at what the trial court had found to result from ethnic concentration, namely, low test scores and high teacher turnover. Thus, the plan called for more teacher training and support and more schooling opportunities through longer school years and early childhood programs. Classes in minority culture and language were included, but no bilingual-bicultural program was required. 313 F. Supp. at 99.

Upon these findings the district court ordered what the court of appeals called "an overhaul of the system's entire approach to education of minorities" by the implementation of the bilingual-bicultural program described above.

On appeal to the court of appeals, petitioners urged three justifications for requiring the Cardenas Plan as a part of a remedy for ethnic segregation. First, it was urged that Hispano pupils, in a desegregated setting, would be isolated in a new way — by culturally different surroundings — and that this isolation is as unconstitutional as ethnic segregation. But the court of appeals, after observing that "the equitable power to order relief . . . is limited . . . by . . . the extent of the proven constitutional violation," (521 F. Supp. at 481; App. p. 53a) noted that there were no findings that the educational program in the schools constituted illegal segregation. Ibid, at 482; App. p. 54a. The court of appeals further observed that existing programs appeared to meet the need to remove linguistic obstacles to effective desegregation. Id; App. pp. 55a, 56a. (And see Id., n. 21; App. pp. 56a)

Second, petitioners urged that the Fourteenth Amendment required an educational program adapted to the unique cultural needs of Hispano pupils. This claim was rejected by the court of appeals on the basis of this Court's decision in *San Antonio Independent School District* v. *Rodriquez*. 411 U.S. 1 (1973).

Finally, it was urged that §601 of the 1964 Civil Rights Act, 42 U.S.C. §2000d, required such a program. The court of appeals, on the basis of the facts in this case, found no violation of §601 in "failing to provide language instruction to substantial numbers of non-English-speaking children." 521 F.2d at 483, n. 22; App. p. 58a, 59a. And the court noted that even if such a violation existed, the Cardenas remedy would go beyond the scope of such a violation. Id., n. 22; App. pp. 58a, 59a.

The court of appeals did not quarrel with the district court's determination that "[s]ome provisions for effecting a transition of Spanish-speaking children to the English language" (380 F. Supp. at 695; App. p. 203a) are necessary. 521 F. 2d at 482; App. p. 54a. But the Cardenas remedy went "well beyond helping Hispano school children to reach proficiency in English necessary to learn other basic subjects" (521 F. 2d at 482; App. p. 54a) and therefore "overstep[ed] the limits of the [district court's] remedial powers." Ibid, at 981; App. p. 53a. The court of appeals accordingly remanded for the purpose of determining "the relief, if any, necessary to insure that Hispano and other minority children will have the opportunity to acquire proficiency in the English language." Ibid., at 483; App. pp. 59a, 60a.

REASONS FOR DENYING THE WRIT

I.

The Petition raises no new questions of substantial significance or importance.

A. *The Question Of Whether The Fourteenth Amendment Requires That Public Schools Provide, For Linguistic Minorities, More Than Programs Designed To Correct Deficencies In Basic English Skills Is Controlled By Previous Decisions Of This Court.*

In *San Antonio Independent School District* v. *Rodriguez, supra* (1973), this Court held that education is not a fundamental right guaranteed by the Constitution, at least where basic minimal skills necessary for the exercise of basic rights such as speech and voting are provided. But where the state undertakes to offer education, it must be made available on equal terms and without segregation on the basis of race or ethnicity. *Brown* v. *Board of Education of Topeka,* 347 U.S. 483 (1954) (Brown I). In *Lau* v. *Nichols, supra,*

(1974), the school district was providing education on equal, nondiscriminatory terms. But some 1,800 of its pupils of Chinese ancestry were unable to speak or write or understand English, the basic language of instruction in the schools, and the school district was not helping them learn English. This Court held that this constituted a breach of the school system's agreement with its funding source not to discriminate on the ground of national origin contrary to §601 of the Civil Rights Act of 1964, 20 U.S.C. §2000d.

It was urged on this Court in *Lau* that failure to provide a program to meet the special needs of pupils with such severe linguistic handicaps violated the Equal Protection Clause. 414 U.S. at 566. But this Court chose, instead, to decide the case on the basis of contractual terms incorporating a requirement that affirmative steps be taken to rectify such language deficiencies.

So here, this Court should decline to review and decide the case on the basis of the Fourteenth Amendment. As in *Lau*, it had been urged in the court below that §601 of the Civil Rights Act of 1964 requires the implementation of a program to remedy educational handicaps which burden members of a linguistic minority.[2] The court of appeals, with the benefit of this Court's decision in *Lau*, found that the small number of non-English-speaking pupils in the Denver schools were receiving appropriate help in several programs directed to their needs. (521 F. 2d 482, n. 21, 483, n. 22; App. pp. 56a-59a), and that there was no violation of §601. Id., n. 22; App. pp. 58a, 59a.

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[2]No specific remedy was urged in *Lau*; the specific and comprehensive remedy urged in this case was held, by the court of appeals, to "overstep the scope of a remedy properly directed to [a §601] violation." 521 F. 2d at 438; App. p. 59a.

B. *The Renewed Claim That The Vacated Remedy Plan Was Justified By a Violation Of §601 Of The Civil Rights Act of 1964 Raises No Question Requiring The Attention Of This Court At This Time.*

Petitioners suggest (Pet. p. 96) that the court of appeals erred when it held that respondent had not violated §601 (42 U.S.C. §2000d) by failing to rectify language deficiencies (521 F. 2d at 483, n. 22; App. pp. 58a, 59a) and that "even if such a violation were supported by the record . . . the Cardenas Plan would . . . overstep the scope of a remedy properly directed to the violation." Id; App. p. 59a.

Petitioners do not claim that English language deficiencies were not being rectified, as required by the 1970 guidelines, (App. p. 320a) under §601. Rather, petitioners argue that a 1975 outline of "appropriate 'affirmative steps'" (App. p. 326a) to rectify such deficiencies, promulgated by the Department of Health, Education and Welfare in 1975, raises the statutory standard to include pupils who speak and can understand English. They then urge that such an outline or guideline, promulgated pursuant to an Act of Congress, becomes the "minimum constitutional standard" under §5 of the Fourteenth Amendment and *Katzenbach* v. *Morgan*, 384 U.S. 641 (1966) at 936, n. 10, and that these claimed new standards of violation and remedy justify the Cardenas Plan. (Pet. pp. 93-101)

A major problem with this issue is that it is not fully and clearly presented. When the court of appeals determined that §601 had not been violated, it did not have before it the 1975 guidelines and did not, therefore, decide whether they were validly issued and, if so, whether they go further, as claimed, than requiring steps to rectify language deficiencies of pupils unable to speak and understand English, as previously required. Moreover, even if more is required under the 1975 guidelines, the Cardenas Plan would still appear to go far

beyond the program required by the new guidelines, and the court of appeals has not decided that issue, either.

This case is not in a posture to permit clarification of "the deference courts are to accord to HEW guidelines," even if the question is of general importance.

II

The holding of the Court of Appeals that the Cardenas Plan went beyond the nature of the constitutional violation is fully in accord with this Court's decisions and does not conflict with the decisions of any other court of appeals.

A. *The Court of Appeals Faithfully Followed this Court's Guidelines.*

In the nature of the matter, this Court, in trying to lay down guidelines for the assistance of lower courts in eliminating from the public schools all vestiges of state-imposed segregation, could only "suggest the nature of limitations" on the Court's equitable remedial powers. *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971), at 14, 31. This Court plainly stated, however,

> "[n]o fixed or even substantially fixed guidelines can be established as to how far a court can go, but *it must be recognized that there are limits.*" Ibid, at 28 (emphasis added)

The clearest limitation is the requirement that there be a violation. "[A]bsent a finding of a constitutional violation, [an educational policy within the discretionary power of a school board] would not be within the authority of a federal court." Ibid, at 16

But even where there is a finding of violation, "the scope of the remedy is determined by the nature and extent of the violation." *Milliken* v. *Bradley*, 418 U.S. 717 (1974), at 744.

These rules of limitation stand, of course, in tension over against other rules emphasizing the "breadth and flexibility

. . . inherent in equitable powers." *Swann, supra,* at 15. But the breadth of such powers is always subject to limits which relate back to the constitutional violation found.

In this case, the violation found was the maintenance of a dual system based entirely on official acts of pupil segregation. The basic and corresponding remedy, therefore, was desegregation of the pupils. In furtherance of pupil desegregation, teachers and staff were reassigned so as to eliminate any "earmarking effect" of a racially identifiable faculty assignment pattern. *Keyes, supra,* at 202.

There was, however, no finding by the district court that the School District's curriculum and educational methods operated to segregate pupils or stood in the way of the desegregation process. Nor was there any finding that the educational program was a product or vestige of the pupil segregation. Thus, in the absence of a constitutional violation, the court of appeals had no basis upon which to approve that part of the district court's order directing the "overhaul of the system's entire approach to education of minorities." 521 F. 2d at 480; App. p. 49a.

Even if failure to provide for the transition to English by Hispano pupils unable to speak or unfamiliar with English (380 F. Supp. at 695; App. p. 203a) constituted a separate constitutional violation, apart from pupil segregation, the court of appeals held that the Cardenas Plan was too broad in scope when measured against that possible violation. 521 F.2d at 482; App. p. 54a. (See the appellate court's description of the Cardenas Plan, 521 F. 2d at 480, 481; App. pp. 49a, 50a.)

For these reasons, the court of appeals vacated the order requiring the Cardenas Plan and remanded with directions to determine whether any relief was required for pupils lacking proficiency in English. Ibid, at 483; App. pp. 59a, 60a.

We submit that the ruling of the court of appeals in this regard is wholly in accord with this Court's guidelines in *Swann*.

B. *There is No Conflict Among the Circuit Courts, and in Particular There is No Conflict Between the Tenth Circuit and Fifth Circuit.*

Outside the Fifth Circuit the only circuit court opinion cited by petitioners (Pet. pp. 72, 73) dealing with the remedy question is *Davis* v. *School District of City of Pontiac, Inc.* 474 F. 2d 46 (6th Cir. 1973). That case deals with whether the power of a district court, where de jure segregation exists, is broad enough to cover the creation of a particular administrative post. The Court of Appeals observed that such an order is within the trial court's discretion provided it was made for the purpose of desegregating the school system. No bilingual-bicultural plan was involved in this opinion or in any other court of appeals opinions outside the Fifth Circuit cited by petitioners.

In only one case did the Court of Appeals of the Fifth Circuit approve a program for the schools similar to the Cardenas Plan as a remedy for de jure ethnic segregation. That was the *San Felipe-Del Rio* case. *United States* v. *Texas*, 466 F. 2d 518 (5th Cir. 1972). In that case a comprehensive plan earlier prepared by Dr. Cardenas for the Department of Health, Education and Welfare was proposed by the newly consolidated school district. Del Rio appealed, but the case was remanded to the District Court in contemplation of an agreed modification of the plan. But differences among the parties again arose and the District Court ordered the implementation of the original comprehensive plan. On a second appeal there was agreement between the parties that the bilingual-bicultural plan would not be contested and the School District's motion for change of venue to another district would not be opposed. The Court of Appeals granted the motion for the change of venue and affirmed the judgment as

to the remedy plan without comment. Thus, the Cardenas-type plan was not tested in the Court of Appeals in an adversary proceeding.

In no other case has the Court of Appeals for the Fifth Circuit approved a desegregation remedy similar to the Cardenas Plan.[3] To the contrary, one of the latest opinions of the Court of Appeals of the Fifth Circuit arising in Uvalde, states that the entire question of whether a bilingual-bicultural education program is necessary to permit Mexican-American students to continue and develop intellectual capacity in Spanish while gradually becoming proficient in English goes to "a matter reserved to educators." *Morales* v. *Shannon*, 516 F. 2d 411 (5th Cir. 1975), at 414, 415.

The *Uvalde* case, which was decided July 23, 1975, was remanded to the District Court with directions to implement, as a remedy for de jure ethnic segregation, the remedy outlined in *Cisneros* v. *Corpus Christi Independent School District*. 467 F. 2d 142 (5th Cir. 1972). The Court of Appeals referred specifically to pages 152-154 of the *Corpus Christi* opinion, which required, as the remedy for de jure segregation of Mexican-Americans, nothing more than the reassignment of pupils and ethnic balancing of the schools. The Court of Appeals, in the *Uvalde* case, refused to order the implementation of the bilingual-bicultural plan and remanded for further consideration on a fresh record in the event the plaintiffs wished to try to show discriminatory practices in the school district's conduct of the Texas statutory elementary school bilingual-bicultural program.

Even more recently, the Court of Appeals for the Fifth

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[3]In *Arvizu* v. *Waco Independent School District*, 495 F. 2d 499 (5th Cir. 1974), a bilingual and bicultural program was to be improved and expanded, but there is no indication in the District Court's order that the plan in Waco was as comprehensive and pervasive as the Cardenas Plan. Ibid. at pp. 1279, 1280. But more to the point, the propriety of the plan was not appealed to the Court of Appeals and was not commented upon there.

Circuit, in remanding a case for reconsideration after holding that de jure segregation of Mexican-Americans existed in New Braunfels, *Zamora* v. *New Braunfels Independent School District,* 519 F. 2d 1084 (5th Cir. 1975), added that the remedy appropriate for such a violation should be considered in the light of *Keyes, supra, United States* v. *Texas Education Agency* (*Austin*) 467 F. 2. 848 (5th Cir. 1972), and *Corpus Christi supra.* In the *Austin* case, the Court of Appeals had required "the greatest possible degree of actual desegregation" in accordance with *Swann;* bilingual instruction was mentioned only as an impermissible substitute for adequate desegregation.

Thus, it is difficult to find the "direct conflict between the Tenth and Fifth Circuits regarding the inclusion of bilingual-bicultural and compensatory education components in court-ordered desegregation plans" as asserted by petitioners (Pet. pp. 81, 82). Whatever the circumstances of the *San Felipe-Del Rio* situation, the consistent position of the Court of Appeals of the Fifth Circuit in its most recent cases is to direct a remedy which goes no further than desegregation or ethnic balance.[4] In no other circuit has a plan similar to the Cadenas Plan been approved. There is no real conflict among the circuit courts on this matter.

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[4]A difference of nomenclature exists, however, between the Fifth and Tenth Circuits. " 'Chicano' is the diminutive of 'Mejicano,' and is, therefore, quite restrictive, and can be used only when referring to Mexicans or Mexican-Americans." (Dr. Daniel Valdez in *La Luz,* June, 1972, p. 61) In Denver most Spanish origin persons come from rural New Mexico and Southern Colorado (Plaintiffs' Exhibit 20, p. 4) rather than from Mexico. Accordingly, "Hispano" is used in Denver, while Mexican-American seems to be the term most commonly used in Texas.

C. *The Court of Appeals Correctly Determined the Applicability of Federal Statutory Standards and Regulations and Guidelines Promulgated Thereunder; Its Decision in No Way Conflicts with any Decision of this Court or any other Court of Appeals Regarding the Applicability of such Standards Pertaining to Language Deficiencies of Public School Pupils.*

The petition (Pet. pp. 83-85) cites no decisions of this Court or any court of appeals using the regulations and guidelines of the Department of Health, Education and Welfare as a standard for formulating relief for a Fourteenth Amendment violation,[5] where the relief in question is a bilingual-bicultural plan such as the Cardenas Plan in this case. Accordingly, the court of appeals decision here cannot be in conflict with applicable decisions of this Court as with decisions of other courts of appeal.

As for the contention that the HEW regulations and guidelines, without reference to other decisions on the point, were not given the required weight by the court of appeals, we submit that the court expressly considered all such matters in its opinion. This contention of petitioners, like the one discussed in Part I-B, *supra*, p. 7, asserts that HEW guidelines set the standard which the courts must follow. The difference is that the other contention claims that the guidelines set both a standard for determining what the Fourteenth Amendment requires for Equal Protection and a measure of the scope of the remedy; the contention here is that the guidelines set a standard for the courts to follow in fashioning remedies.

In this case the court of appeals expressly found that the Cardenas Plan overstepped the scope of a remedy directed to a violation of §601 of the 1964 Civil Rights Act, 42 U.S.C.

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[5] *Lau, supra*, was expressly not decided on the basis of the Fourteenth Amendment.

§2000d. At the time of the decision (August 11, 1975) the court did not have before it the guidelines promulgated that summer (App. p. 324a-359a). The prior guidelines and regulations deal with pupils like those in *Lau, supra,* who are unable to speak and understand English. App. p. 320a. The court of appeals correctly held that the Cardenas Plan went far beyond rectifying such a language deficiency. 521 F. 2d at 483, n. 22; App. pp. 58a, 59a.

Petitioners claim that the new 1975 guidelines enlarge the scope of the remedy for violation of §601. Whether or not this is true, the court of appeals found that there was no violation of §601. Id; App. p. 58a, 59a. The issue raised here by petitioners is thus not reached in this case unless a new violation is established upon remand. This is not the kind of important question contemplated by Rule 19 of the Rules of this Court.

CONCLUSION

Respondents *School District No. 1, Denver, Colorado, et al,* respectfully urge that the petition for certiorari should be denied for the reasons stated above.

Respectfully submitted,

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